SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

221

No. 221

SKELLY OIL COMPANY ET AL., *Petitioners*

vs.

PHILLIPS PETROLEUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. _____

SKELLY OIL COMPANY ET AL., *Petitioners*

VS.

PHILLIPS PETROLEUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Skelly Oil Company, Stanolind Oil and Gas Company and Magnolia Petroleum Company, praying that writ of certiorari issue to review the final judgment and decree of the United States Court of Appeals for the Tenth Circuit entered in that certain

cause lately pending in said Court, being styled Skelly Oil Company, a corporation; Stanolind Oil and Gas Company, a corporation; and Magnolia Petroleum Company, a corporation; Appellants, vs. Phillips Petroleum Company, a corporation, Appellee, and numbered 3751 on the docket of said Court, show:

Summary Statement of the Matter Involved

Phillips Petroleum Company and Michigan-Wisconsin Pipe Line Company[1] brought this action for declaratory judgment against petitioners.[2] Upon motion, Michigan-Wisconsin was dropped as a party plaintiff. (R. 107.)

On December 5, 1945, Skelly and Stanolind, and on December 7, 1945, Magnolia, entered into separate contracts with Phillips for the sale by petitioners, respectively, and the purchase by Phillips of gas to be produced from certain lands in the Hugoton Field (R. 36-62). These three contracts were substantially identical except as to the lands involved. Section 2 of Article II of each contract contained a provision for termination (R. 41), the pertinent portion of which reads as follows:

"provided, however, that in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the

[1]Hereafter referred to as Phillips and Michigan-Wisconsin. Phillips will also sometimes be referred to as respondent or plaintiff.

[2]Hereafter referred to as Skelly, Stanolind and Magnolia, respectively, and sometimes as petitioners or defendants.

event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate."

On December 2, 1946, petitioners, acting under Section 2 of Article II of their respective contracts, separately gave respondent notice of the termination thereof. (R. 605-606.) On July 15, 1947, respondent brought this action for declaratory judgment (R. 3-11), praying that the court decree that a certificate of public convenience and necessity was issued to Michigan-Wisconsin within the requirements of the Natural Gas Act prior to any notice by petitioners of their termination of their respective contracts; that petitioners had no right to terminate such contracts, and that the same were in effect and binding upon the parties thereto; that the petitioners, and each of them, be enjoined and restrained from asserting, contending, claiming or alleging that a certificate of public convenience and necessity was not issued to Michigan-Wisconsin in accordance with the requirements of the Natural Gas Act and said contracts, and from asserting, claiming or alleging that any of petitioners is not bound by its contract with respondent. (R. 10-11.)

1. *As to Jurisdiction.*

Diversity of citizenship does not exist as between Phillips and all of the defendants. (R. 3-4) In the

complaint, respondent alleged jurisdiction upon the ground that the case was one arising under a law of the United States. (R. 4.) Petitioners separately moved for dismissal because of lack of jurisdiction. (R. 66, 95, 101.)

The allegations of the original complaint relied upon by respondent to show jurisdiction under Sec. 41, Title 28 (now Sec. 1331), are:

(1) That on December 5, 1945, and December 7, 1945, Phillips entered into certain contracts with the petitioners, respectively, as above stated. (Par. 5, R. 5.)

(2) That on December 11, 1945, Phillips and Michigan-Wisconsin entered into a contract whereby Phillips contracted to supply Michigan-Wisconsin certain gas "and obligated itself for the furnishing of gas reserves," including the gas to be purchased under said contracts of December 5, 1945, and December 7, 1945. (Par. 6, R. 5.)

(3) That Michigan-Wisconsin instituted proceedings before the Federal Power Commission for a certificate of convenience and necessity, and on November 30, 1946, the Commission made an order granting the application of Michigan-Wisconsin, and on said date issued the certificate and caused notice thereof to be given on that date. (Pars. 6, 7 and 8, R. 6-7.)

(4) That petitioners assert that no certificate within the requirements of the Natural Gas Act was secured by Michigan-Wisconsin, and that petitioners have misconstrued the Act. (R. 9, 10.)

(5) That each petitioner, on December 2, 1946, sent written telegraphic notice of termination to Phillips. (No question is raised as to the sufficiency of these notices, the issue being as to whether the right to terminate existed at the time the notices were sent.) (R. 7, 8.)

Petitioners having duly filed their motions to dismiss for want of jurisdiction, assigning as grounds that the case was not one arising under a federal law (Skelly, R. 66; Stanolind, R. 95; Magnolia, R. 101), the respondent filed its "Amendment to Complaint" (R. 103) and again alleged that the action was one arising under the Natural Gas Act (R. 104), and in support of that claim made the following averments:

"The plaintiffs assert and allege that the actions of said Federal Power Commission on November 30, 1946, constituted the issuance on said date of a certificate of public convenience and necessity under the requirements of the Natural Gas Act. Said Act provides in Section 717n (b) that 'All hearings, investigations and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission' and in Section 717o that 'Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe.' Under the procedure of said Commission then in effect pursuant to the terms and provisions of said Act, and particularly these sections last mentioned, the actions and proceedings of the Commission did constitute the issuance by the Commission of a certificate of public convenience and necessity on November 30, 1946, and did constitute the issuance of such a certificate prior to said

telegraphic notices by the defendants to the plaintiff Phillips on December 2, 1946. The defendants contend and assert otherwise and in doing so they fail to properly construe, or to give appropriate effect to, said Act and the rules, regulations and procedure of said Federal Power Commission then in effect pursuant to the terms and provisions of said Act." (R. 105.)

Plaintiffs attached to said amendment as Exhibit 2 a copy of the order of November 30, 1946. (R. 105.) This order appears in the record at pages 439-445.

Respondent further alleged that the certificate issued to Michigan-Wisconsin "contained certain conditions, by reason of which the defendants contend that the certificate of public convenience and necessity issued to said plaintiff pipe line company * * * was insufficient and entitled the defendants to terminate the said contracts" (R. 105-106); and that the contentions of the petitioners "necessarily bring into play and call for the construction" of the Natural Gas Act and it again asked for declaratory relief to the effect that the petitioners have no right to terminate any of said contracts. (R. 106.)

It is the contention of petitioners (1) that if the Natural Gas Act and the rules and regulations of the Power Commission are involved at all, it is only because of the defenses which respondent alleged petitioners would assert, and because of the matters relied upon by respondent, as plaintiff, to avoid the legal effect of these defenses; that is, that the case falls under the rule that the plaintiff cannot create original federal jurisdiction by anticipating a de-

fense and alleging matters in avoidance that involve the decision of federal questions; and (2) that the case "arises" under the contracts, and particularly under the termination clauses of the contracts (hereinbefore quoted) and not under the Natural Gas Act. Respondent asserts no right or claim under the Federal Natural Gas Act or the rules and regulations of the Commission.

2. *As to Skelly and Stanolind Motions.*

In their consolidated motions, Skelly and Stanolind included a motion to dismiss or abate, or, in the alternative, to stay this action until the Texas actions below referred to were disposed of. The proceedings in Texas are set forth in Exhibits A and B (Skelly's Consolidated Motions, R. 69-93). It was there made to appear that previously Skelly and Stanolind separately filed, on May 20 and 21, 1947, in the 126th District Court of Travis County, Texas, actions against the Phillips Petroleum Company, each setting forth the making of its contract with Phillips, notice of termination thereof, and the resulting controversy as to whether the termination was effective—the identical subject matter involved in this action. Each action sought a declaratory judgment to the effect that, under the terms of said contract and under the facts existing when the notice of termination was given, the right to terminate the contract then existed and that each plaintiff was no longer obligated by any of the terms or provisions of the contract (Skelly's petition filed in the state court, R. 69-77; Stanolind's, R. 82-88). It further

appears from the exhibits referred to that in each of said actions Phillips filed its petition for removal to the United States District Court for the Western District of Texas (Skelly suit, R. 79; Stanolind suit, R. 90); and that orders of removal were entered on June 6, 1947 (R. 81, 92), and thereafter the record in each of said actions was filed in the federal court.

3. *The Merits.*

The primary issue on the merits was whether the Commission, by adopting its order of November 30, 1946, issued on that date a certificate of public convenience and necessity to Michigan-Wisconsin authorizing it to construct and operate its proposed pipe line; and, if so, whether it was then effective to authorize it to construct and operate said pipe line and thereby satisfied the termination provisions of petitioners' contracts with the respondent. Respondent contended, as above shown, that it did: Petitioners contended that it did not. (Answer of petitioners, Skelly R. 108-113; Stanolind R. 122, 125-131; Magnolia R. 132, 135-142.)

In the contracts between petitioners and respondent (R. 37-38) it was recited that respondent was negotiating a contract with Michigan-Wisconsin, and that it was contemplated that such contract would contain provisions defining four contingencies, upon the happening of any one of which the contract might be terminated by Phillips upon thirty days' notice. One of these contingencies was the failure of Michigan-Wisconsin to procure a certificate of public convenience and necessity from the Federal

Power Commission on or before September 1, 1946. (R. 13.) The contract between respondent and Michigan-Wisconsin, dated December 11, 1945, did actually contain these provisions. (R. 13.)

We have heretofore quoted the clause of the contracts between petitioners and respondent authorizing petitioners to terminate (by notice) each of said contracts at any time after December 1, 1946, but before the issuance by the Federal Power Commission to Michigan-Wisconsin of a certificate of public convenience and necessity for the "construction and operation of its pipe line." (*Ante*, pp. 2-3.)

The order of the Federal Power Commission which respondent relied upon as satisfying the terms of the above quoted provisions of the contracts between petitioners and respondent, but which petitioners contend did not so do, was dated November 30, 1946. Its pertinent provisions (R. 439, 441-445), after setting forth some eight findings, are divided into paragraphs (A), (B), and (C). Paragraphs (A) and (B) contain several sub-paragraphs. Paragraph (A) provided:

"A certificate of public convenience and necessity be and it is hereby issued to Applicant, upon the terms and conditions of this order, authorizing it (Michigan-Wisconsin) to:" construct and operate certain gas transmission pipe line facilities generally described in the sub-paragraphs of Paragraph (A). (R. 441-2.)

Paragraph (B) provided: "This certificate is granted to applicant upon the following terms and

conditions:" and these terms and conditions are set forth in twelve sub-paragraphs. (R. 442-445.)

While in Paragraph (A) the Commission stated that "A certificate of public convenience and necessity be and is hereby issued to Applicant," the Commission also stated that it was issued "upon the terms and conditions of this order." Certain of the conditions had the effect of postponing indefinitely any right of Michigan-Wisconsin to use the proposed pipe line for the transportation or sale of gas in interstate commerce pending later administrative action to be taken by the Commission or other administrative bodies. Such conditions are summarized as follows:

(1) "There shall be no transportation or sale of natural gas * * * by means of the facilities herein authorized until all necessary authorizations" have been obtained from the state of Wisconsin and the communities proposed to be served in said state. (Par. (ii); R. 442.) None of said authorizations had been obtained at the time (February 17, 1948, R. 184) of the pretrial conference in the District Court (R. 217-218).

(2) "Applicant shall obtain approval of its proposed plan of financing by the Securities and Exchange Commission, and the grant of the certificate herein authorized shall be without prejudice to any action which may be taken by that Commission." (Par. (iii), R. 443.) Finding (4) (R. 440-441) was that without the authorizations provided for in paragraph (ii) (item "1" above) and (iii) (this item

"2") the project can "neither be financed, constructed nor operated." (It was not until in November and December, 1947, R. 608 *et seq.* and 618 *et seq.*, that the first partial approval of the financing was given by the Securities and Exchange Commission. It was not until December 10, 1947, that construction of the pipe line was commenced. Trial court's finding 17, R. 175.)

(3) "The facilities referred to in Paragraph (A) (2) above (facilities located in the Austin and Reed City Storage Fields) shall not be used for the transportation or sale of natural gas, subject to the jurisdiction of the Commission," except upon approval by the Commission of a contract between Michigan-Wisconsin and Michigan Consolidated Gas Company to be filed with the Commission on or before December 16, 1946. (Par. (iv); R. 443.)

(4) "There shall be no transportation or sale of natural gas * * * by means of facilities herein authorized" unless an application for a certificate of public convenience and necessity is filed within fifteen days by the Austin Field Pipe Line Company and a certificate granted by the Commission for the construction and operation of facilities necessary to transport certain required volumes of gas. (Par. (v); R. 443.)

(5) "There shall be no transportation or sale of natural gas * * * by means of the facilities herein authorized" until a proper application for a certificate of public convenience and necessity is filed by Michigan Consolidated Gas Company for the con-

struction or operation of certain additional facilities in the Austin and Reed City Storage Fields. (Par. (vi); R. 443.)

(6) "This certificate is granted upon the express condition that the facilities herein authorized shall not be used for the transportation for or sale of gas to Michigan Consolidated Gas Company for resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern," which rights and duties were to be determined by supplemental order to be issued by the Commission. (Par. (viii); R. 444.) This supplemental order was not issued until March 12, 1947, long after the termination notices were sent and received. (R. 555-7.)

(7) Paragraph (ix) provided that Michigan-Wisconsin should within fifteen days after issuance of the supplemental order provided for in paragraph (viii) notify the Commission whether the certificate was acceptable to it (R. 444).

Paragraph (C) of said order provided (R. 445) that:

"For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

The first of the opinions here referred to was issued February 7, 1949. (R. 476-519.) A supple-

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Footnote:

Petitioners contend that Paragraph (C) suspended the order as a whole until March 12, 1947, when the supplemental order therein referred to was issued.

mental opinion (R. 536-555) and the supplemental order were dated February 20, 1947, and issued March 12, 1947. (R. 555-556.)

4. *The decision below:*

The Court of Appeals in affirming the judgment of the District Court held that the order of November 30, 1946, issued the certificate on its date and that it was immediately effective. (R. 722-723.)

The Court held that Paragraph (C) of said order was intended by the Commission to relate only to an application for rehearing with respect to the limitation with reference to the Detroit and Ann Arbor service areas in subparagraph (viii) of Paragraph (B) to be more particularly defined by a supplemental order. (R. 726.)

5. *Conflict Between this Decision and a Prior Decision of the United States Court of Appeals for the District of Columbia.*

Panhandle Eastern Pipe Line Company, herein referred to as Panhandle Eastern, was a party to the proceedings in which the order of November 30, 1946, was entered by the Commission. Panhandle Eastern and other parties to said proceedings, within thirty days after the adoption of that order, filed their applications for a rehearing of the same (R. 369). These applications were denied by the Commission January 14, 1947 (R. 694-696) on the sole ground that they were prematurely filed because filed in advance of the issuance of the opinions and

supplemental order provided for in Paragraph (C). On February 7, 1947 (R. 733), and prior to the issuance of the opinions and supplemental order before referred to, Panhandle Eastern filed its petition for review of the November 30 order in the United States Court of Appeals for the District of Columbia in a proceeding entitled *Panhandle Eastern Pipe Line Company, Petitioner, v. Federal Power Commission, Respondent.* The said Court entered its order on April 21, 1947, dismissing the petition for review upon the ground "that the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders," this having reference to the supplemental order above referred to. (R. 704.) Panhandle Eastern then applied to this Court for certiorari and its petition was denied. (332 U. S. 762.)

Petitioners contend that the decision of the Court of Appeals in the instant case is in clear conflict with the decision of the Court of Appeals for the District of Columbia in respect to the status of said order of November 30, 1946, the latter court having distinctly held that it was not a final order and did not then represent completely effective administrative action and, being a decision on direct review, it was binding on the parties and conclusive of that question in this suit.

Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28, United States Code, Secs. 1254(1) and 2101. The judgment of the United States Court of Appeals for

the Tenth Circuit was entered on March 28, 1948. (R. 707.) Petition for rehearing was duly filed and entertained, and rehearing was denied on May 9, 1949. (R. 732.)

The Questions Presented

1. Whether the Court of Appeals erred in holding that original federal jurisdiction existed in this case under Title 28, U.S.C.A., Sec. 41 (now Sec. 1331) and in that connection erred in holding that the action was not one arising under the contracts and state law but was one arising under the Federal Natural Gas Act and the rules and regulations of the Federal Power Commission.

2. Whether the Court of Appeals erred in holding that the district court did not abuse its discretion in refusing to abate or dismiss this action because of the pendency of other actions in the District Court of the United States for the Western District of Texas, previously filed and seeking declaratory relief in respect to the same matter; or, in the alternative, to stay this action until the other actions were disposed of.

3. Whether the order of the Federal Power Commission adopted on November 30, 1946, issued a certificate of public convenience and necessity immediately upon the adoption of said order.

4. Whether said order of November 30, 1946, satisfied the termination clauses of the three contracts and constituted the issuance of such a certificate as was contemplated by said contracts.

5. Whether the Court of Appeals erred in failing to hold that the adjudication made by the Court of Appeals for the District of Columbia in the Panhandle Eastern suit against the Commission (this Court denying certiorari, 332 U. S. 762) adjudicated the status of said order of November 30, 1946, as not being a final order and as representing on that date only incomplete administrative action and therefore one which was not then effective to grant or issue a certificate.

Reasons Relied on for the Allowance of the Writ

1. The decision of the Court of Appeals to the effect that the district court had original jurisdiction of this action as one arising under a law of the United States is in conflict with the applicable decisions of this Court and is clearly erroneous. The decision is obviously one of high importance. If it be approved as correct, federal jurisdiction will be vastly extended. It will be open to a plaintiff, instead of filing an action to obtain coercive relief, to file a declaratory judgment action and create jurisdiction by alleging that the defendant is asserting certain defenses or contentions in denial of plaintiff's right and that federal questions will arise in deciding whether these defenses are tenable. In arriving at this decision, the Court of Appeals erroneously held that a declaratory judgment action may be analogized to an action to remove cloud from title, treating every denial by the defendant of the plaintiff's right as creating a cloud on that right. (Supporting Brief, pp. 24-34.)

2. The claimed jurisdiction does not rest upon a substantial federal ground in view of the fact that the District of Columbia Court of Appeals had already held in the Panhandle Eastern suit that the November 30, 1946, order showed on its face that it was not final because "it required for completion the issuance of a supplemental order or orders." (R. 704.)

3. The holding of the Court of Appeals that the district court had jurisdiction of this action because it was filed under the Declaratory Judgment Act is not only erroneous but is in conflict with the decisions of other federal courts, including other courts of appeals, hereinafter reviewed, holding, in effect, that the Declaratory Judgment Act is not a jurisdictional statute and that it has not changed or enlarged the jurisdiction of federal courts or created a new cause of action, and that jurisdiction of an action for declaratory judgment exists only where federal jurisdiction would exist over a matured cause of action for damages, specific performance, or other relief. (Supporting Brief, pp. 30-31.)

4. The holding of the Court of Appeals that the order of the Federal Power Commission dated November 30, 1946, was on that date fully effective to grant and issue a certificate was clearly erroneous and is in conflict with the decision of the Court of Appeals for the District of Columbia in *Panhandle Eastern Pipe Line Company v. Federal Power Commission*, dated April 21, 1947, which held that said order was not a final order on November 30, 1946, and did not represent completely effective adminis-

trative action on said date and, for that reason, was not subject to judicial review. (Supporting Brief, pp. 34-40.)

5. The holding of the Court of Appeals that the order of the Federal Power Commission dated November 30, 1946, issued a certificate which was immediately effective and satisfied the termination clauses of petitioners' three contracts is clearly erroneous. (Supporting Brief, pp. 40-47.)

6. The decision of the Court of Appeals that said order of November 30, 1946, was effective to issue a certificate on its date is believed to be in conflict with the decisions of this Court in *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309-310, and *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103, 110-113. (Supporting Brief, p. 36.)

7. This case presents important questions of administrative law and procedure which it is believed this Court should determine.

8. The decision of the Court of Appeals to the effect that the district court did not abuse its discretion in refusing to abate or dismiss this action, or, in the alternative, stay the trial of the same pending the disposition of the actions filed by Stanolind and Skelly in a state court in Texas and removed from that court by Phillips to the United States Court for the Western District of Texas, is in conflict with the decisions of this Court and other courts. (Supporting Brief, pp. 47-50.)

Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 3751, Skelly Oil Company, Stanolind Oil and Gas Company and Magnolia Petroleum Company, Appellants, vs. Phillips Petroleum Company, Appellee; and that the judgment of the United States Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. _____

SKELLY OIL COMPANY ET AL., *Petitioners*

vs.

PHILLIPS PETROLEUM COMPANY

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinion of Court Below

The opinion of the United States Court of Appeals is reported in 174 F. (2d) 89. (R. 708-728.)

II.

Jurisdiction

The basis upon which the jurisdiction of this Court is being invoked is stated in the Petition, p. 14.

III.

Statement of the Case

It is believed that a sufficient statement of the case, in so far as concerns the questions presented, has been made in the preceding Petition under the heading "Summary Statement of the Matter Involved" (Petition, pp. 2-14), which in the interest of brevity is adopted here.

IV.

Specification of Errors

1. The United States Court of Appeals erred in holding that the district court had original jurisdiction of the action.

2. The United States Court of Appeals erred in holding that the district court did not abuse its discretion in refusing to abate or dismiss this action because of the pendency of other actions in the District Court of the United States for the Western District of Texas, previously filed and seeking declaratory relief in respect to the same matter; or, in the alternative, to stay this action until the other actions were disposed of.

3. The United States Court of Appeals erred in holding that the order of the Federal Power Commission of November 30, 1946, became on that date a final order of the Commission and effective to issue a certificate.

4. The United States Court of Appeals erred in holding that the order of the Federal Power Commission, dated November 30, 1946, satisfied the contracts and destroyed the right to terminate them.

5. The United States Court of Appeals erred in holding that said order of November 30, 1946, was a final and effective order, its decision on that point being in conflict with the decision of the Court of Appeals for the District of Columbia and decisions of this Court, as is elsewhere more fully pointed out.

V.

Summary of Argument

1. The district court was without jurisdiction.

2. There is a clear conflict between the decision in the instant case and a prior decision made by the United States Court of Appeals for the District of Columbia.

3. The decision of the Court of Appeals for the District of Columbia, having been made in a direct review suit, was binding on the Commission and conclusive on the court in the instant case.

4. The order of the Federal Power Commission of November 30, 1946, was not in effect on that date and did not on that date issue a certificate authorizing the construction and operation of the proposed pipe line, or satisfy the termination clauses in petitioners' contracts.

5. The Court of Appeals erred in holding that the district court did not abuse its discretion in refusing

to dismiss or abate, or, in the alternative, to stay this action.

VI.

Argument

1. The district court was without jurisdiction.

From the statement heretofore made it appears that the respondent, to support original jurisdiction in a court of the United States, under Title 28, Sec. 41 (now Sec. 1331), relied upon its statement of the defense which it alleged the defendants would or might assert and the allegations made by it in avoidance of that defense; in short, that the construction of a federal statute and the orders and regulations of the Federal Power Commission would come into the case only by way of condemning the defense.

If this action had been brought by respondent as one seeking coercive relief under the contracts (damages for breach or to compel specific performance), the Court would have had no jurisdiction. The rule is well established by the decisions of this Court that, where jurisdiction is claimed because of the presence of a federal question, that question must arise on plaintiff's own statement of his cause of action, and that the plaintiff is not entitled to create jurisdiction by anticipating a defense and seeking to avoid that defense by asserting that it is condemned by some federal statute, when properly construed. The leading case applying this rule is *L. & N. R. R. v. Mottley*, 211 U. S. 149. The rule has been applied

in many other cases: *Tennessee v. Union and Planters' Bank*, 152 U. S. 454; *Taylor v. Anderson*, 234 U. S. 74, and cases there cited.

The Mottleys brought their suit to enforce specific performance of their contracts with the Railroad Company and alleged the defense upon which the company was relying, and, further, that that defense was based upon a wrong construction of a federal law—the Interstate Commerce Act. Original jurisdiction was denied. Under the holding of the Court of Appeals in this case, if the Mottleys, after the enactment of the Declaratory Judgment Act, had brought their action as one for a declaratory judgment, they could have maintained federal jurisdiction. The two cases cannot be distinguished except upon the theory that federal jurisdiction exists where there is resort to one remedy and does not exist where there is resort to a different remedy, the underlying right or cause of action remaining the same.

The Court of Appeals has, in effect, held that what may be called the Mottley rule or doctrine is not applicable because this action was one brought under the Declaratory Judgment Act. The Court in making that holding states that the action may be analogized to a suit to remove cloud from title. Such analogy does not exist. In a suit to remove cloud from title, the nature of the defendant's claim and its invalidity constitute essential parts of the plaintiff's cause of action. Defendant's claim creates a cloud. The removal of the cloud is the entire purpose of the suit. The allegations descriptive of the cloud are allegations setting forth the plaintiff's

cause of action. In such a case the bill is not one to quiet title generally but "is one to remove a *particular* cloud from the plaintiff's title, as much so as if the purpose were to have a tax deed, a lease, or a mortgage adjudged invalid and cancelled." *Hopkins v. Walker*, 244 U. S. 486, 490, distinguished in *Barnett v. Kunkel*, 264 U. S. 16, 21.

Hopkins v. Walker, *supra*, does not hold that a plaintiff can create jurisdiction by anticipating a defense the avoidance of which requires the decision of federal questions. In that case it was held merely that, where the action is one to remove "a particular cloud" from the plaintiff's title, federal jurisdiction exists if a proper description of the cloud brings federal questions under consideration. It is pushing analogical reasoning too far to hold, as the court below held in this case, that every denial by the defendant of plaintiff's right creates a cloud on that right. This action was not brought to remove a cloud from plaintiff's right under its contracts but was brought simply to enforce the contracts as plainly as if it had been brought as an action for damages.

In a declaratory judgment action, what the defendant may be claiming is no part of the plaintiff's case or right. In this case the plaintiff's cause of action is constituted by its contracts and by the defendants' refusal to recognize the existence of the contracts. Why the defendants refuse to recognize the contracts as binding on them is no part of the plaintiff's case. Federal jurisdiction in this action seeking declaratory relief cannot be created, any more than in any other case, by the nature of the defense asserted. It does not rest with the plaintiff

to choose the defendants' defenses. Federal jurisdiction cannot be made to depend upon the choice of a defense either by the defendant or by the plaintiff for the defendant. *Taylor v. Anderson*, 234 U. S. 74, 75.

The Court of Appeals in its opinion states that "a factual element essential in an action for a declaratory judgment is the existence of an actual controversy" and that the description of this controversy is an essential part of the plaintiff's case. The ordinary case involves a "controversy" as to whether certain rights claimed by the plaintiff in fact exist. But here, as in the ordinary case, it is the plaintiff's right, and not the defendants' reasons or excuse for denying that right, that constitute the plaintiff's case for jurisdictional purposes.

The fundamental idea underlying the rule declared in the *Mottley* case and similar cases is the lack of right on the part of the plaintiff to commit the defendant in advance to reliance on a particular defense. Plaintiff has no more right thus to commit the defendant in an action where declaratory relief is sought than in an action where ordinary coercive relief is sought. Filing a declaratory action, instead of waiting and later filing a coercive action, does not change the nature of the underlying right or cause of action.

In every case it is necessary for the plaintiff to obtain a judgment condemning the defendant's defense—all defenses upon which the defendant relies. But that does not mean that the defenses constitute an affirmative part of the plaintiff's right or cause of action. Nor does it entitle the plaintiff to

create jurisdiction by alleging in an anticipatory way that defendant is relying on a given defense and that the settlement of that defense in favor of the plaintiff will involve the decision of a federal question.

The Court of Appeals asserts that this action "is to secure an adjudication of an existing controversy" and that "it is not an action to enforce or construe the contracts of December 5 and 7, or for the breach thereof." (R. 721.) This, we submit, is plainly wrong. The action is one to obtain an adjudication that plaintiff's contracts are in full force and effect. It is one to enforce its rights under the contracts, in the way and to the extent permitted by the Declaratory Judgment Act. Obtaining a declaration that the contracts are in full force and effect is not the kind of enforcement that could be obtained in an action for damages but it is at least a partial enforcement. Obtaining that declaration, plaintiff can then go into a state court and file an action for damages or specific performance and rely upon the adjudication made in this case that the contracts are in full force and effect. The declaratory relief sought here is an essential part of respondent's effort to enforce the contracts.

This Court has held that the award of execution is not an essential part of a judgment. It "is not an indispensable adjunct to the exercise of the judicial function." *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 263; *Fidelity National Bank v. Swope*, 274 U. S. 123, 132. See also Borchard, *Declaratory Judgments* (2nd ed.), pp. 8-14.

All of plaintiff's rights stem from the contracts and not at all from the "controversy" concerning their continued existence. The cause of action is based upon the contracts and not upon the so-called controversy concerning their continued existence. Plaintiff must establish its case in this action in the same way as in an action for damages. It must prove the making of the contracts and their continued existence.

In the same connection the Court of Appeals further held that plaintiff's claim is not one "arising out of, or dependent upon, state law. Rather, it is a claim arising out of, and dependent upon, the construction and application of Federal law, to-wit, the Act and the valid rules and regulations of the Commission promulgated thereunder." (R. 721.) This holding, we submit, is erroneous. Plaintiff's claim is based upon the contracts, which depend for their validity and legal effect wholly upon state law. Plaintiff is claiming no right granted to it by the Natural Gas Act or by the rules and regulations of the Commission.

In a declaratory judgment action, the plaintiff need allege no more than in an ordinary case; that is, that he has certain rights and that the defendant has denied the existence of these rights. The justifying reasons, if any, asserted by the defendant—and the action is maintainable even if the defendant has no justifying reasons—constitute no part of the plaintiff's case. The action is not brought to obtain an adjudication that the justifying reasons or defenses are untenable. The matter involved is whether plaintiff's claim or right exists; not whether

the defenses are good. The plaintiff was not required to allege any more than it would have been required to allege if it had elected to affirm that there was an anticipatory breach and had sued for damages or specific performance.

Had plaintiff thus proceeded, it would not have been required to allege any reason for the breach and would have been entitled to proceed in that way even if the defendants had given no reason or had refused to give a reason. The same is true in this action for a declaratory judgment. In neither case can jurisdiction be made to depend upon the character of the reason assigned for the breach—or even lack of reason.

Absent diversity, federal jurisdiction of a declaratory action does not exist where the sole purpose of such action is to obtain a declaration that defendant's contentions involve the decision of federal questions and that these contentions are without merit. If successful, plaintiff could subsequently enter a state court with his suit for damages or specific performance (of which a federal court would have no jurisdiction), armed with a judgment that a particular defense which defendant might interpose is untenable. This is to do indirectly what cannot be done directly.

It has been held "that the operation of the Declaratory Judgment Act is procedural only" (*Ætna Life Insurance Co. v. Haworth*, 300 U. S. 227, 239); that the Act affords an "additional remedy for use in cases of which the federal courts already have jurisdiction" (*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 137 F. (2d) 176, aff'd 321 U. S. 590);

that the Act is limited to cases "within the jurisdiction of the federal courts if affirmative relief were being sought" (*Southern Pacific Co. v. McAdoo* (C. C. A. 9), 82 F. (2d) 121; *Hary v. United Electric Coal Co.*, 8 F. Supp. 655, 656); that the Act should not be construed in such a way "as to encroach upon the state jurisdiction" (*Mutual Life Ins. Co. of New York v. Moyle*, 116 F. (2d) 434); that jurisdiction should be denied in cases like this where a declaration is sought establishing the invalidity of an anticipated defense (*Magic Foam Sales Corp. v. Mystic Foam Corp.*, 167 F. (2d) 88; *Wells v. Universal Pictures Co.*, 64 F. Supp. 852); and that it must be shown that if coercive relief instead of declaratory relief were being sought, the federal courts would have original jurisdiction (*Gully v. Interstate Natural Gas Co.*, 82 F. (2d) 145, 149).

The decision of the Court of Appeals is believed to be in conflict with prior decisions of the same Court in *Ohio Casualty Co. v. Marr*, 98 F. (2d) 973 (cert. den. 305 U. S. 652); *McCarty v. Hollis*, 120 F. (2d) 540; and *Sinclair Refining Co. v. Burroughs*, 133 F. (2d) 536, in which it was held that the Declaratory Judgment Act has not created any new right or cause of action and has not changed or extended federal jurisdiction or changed or altered the character of controversies falling within federal jurisdiction.

If the opinion of the Court of Appeals be accepted as correct, then these decisions must be disapproved and it must be held that federal jurisdiction has been vastly extended by the Declaratory Judgment Act into a new field where jurisdiction exists if

the construction of a federal statute is invoked by the plaintiff for no purpose except to avoid a defense that may or may not be asserted by the defendant. If original federal jurisdiction exists here, then it would exist in any case where, because of the presence of a federal question raised by the defendant, this Court would have appellate jurisdiction. Under such a rule, original federal jurisdiction in the district court would be made as broad as the appellate jurisdiction of this Court to review judgments of state courts denying the validity of federal defenses.

We next submit that the case is not one "arising" under the Federal Natural Gas Act, but, instead, is one arising under the termination clause of the three contracts between Phillips and the three defendants and under the state law ascribing validity and legal effect to such termination clause.

Where a contract is made under a state law, the fact that its construction may require resort to some federal statute to ascertain its meaning and effect does not mean that a controversy concerning its construction is one arising under the federal statute. *Miller's Executors v. Swann*, 150 U. S. 132; *L. & N. R. R. Co. v. Western Union Telegraph Co.*, 237 U. S. 300; *Interstate Street Ry. Co. v. Massachusetts*, 207 U. S. 79; *Gully v. First National Bank*, 299 U. S. 109, 114-116; and *Puerto Rico v. Russell & Co.*, 288 U. S. 476.

In this connection we direct attention to the recent opinion of the Court in *National Mutual Insurance Company v. Tidewater Transfer Company*, announced June 20, 1949, and more especially to the opinion of Mr. Justice Jackson, in which Mr. Justice

Black and Mr. Justice Burton joined, as well as to the concurring opinion of Mr. Justice Rutledge, to which Mr. Justice Murphy agreed. The clear inference from these opinions is that this Court still adheres to the test of jurisdiction as stated by Mr. Justice Cardozo in *Gully v. First National Bank*, 299 U. S. 109, 112, as follows:

"To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

In the opinion of Mr. Justice Jackson the following statement is quoted from *Puerto Rico v. Russell & Company*, 288 U. S. 476, 483, with emphasis added:

The federal nature of the right to be established is decisive—not the source of the authority to establish it."

The Court of Appeals in the instant case referred to the *Gully* case (174 F. (2d) 97, 98) and the following statement was made—the same statement that was in effect made by the same learned judge in *Regents of New Mexico College v. Albuquerque Broadcasting Co.*, 158 F. (2d) 900, 907:

"To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element and an essential one of the plaintiff's cause of action."

There is no conflict between the opinion of the court below and the opinion of this Court in the

Gully case in the statement of the applicable rule as to jurisdiction. The holding in this case is erroneous because it proceeds upon the erroneous theory that the cause of action is asserted under the Natural Gas Act and the rules and regulations of the Commission, whereas, plaintiff's cause of action is grounded upon the contracts and not at all upon the Natural Gas Act or the rules and regulations of the Commission.

2. There is a clear conflict between the decision on the merits in the instant case and the adjudication made by the United States Court of Appeals for the District of Columbia on April 21, 1947, in the suit brought by Panhandle Eastern Pipe Line Company against the Federal Power Commission for direct review of said order of November 30, 1946.

In the "Summary Statement of the Matter Involved," we have set out the basic facts concerning the suit filed by Panhandle Eastern Pipe Line Company in the Court of Appeals for the District of Columbia. (Petition, p. 13.) The decision in that case and the decision of the Court of Appeals in this case are clearly conflicting. In the instant case the court below held that the order of November 30 was effective to issue on that date the certificate therein referred to. (Tr. 722, *et seq.*) This, by necessary implication, was a holding that said order became immediately a final order and subject to review. Said holding is in direct conflict with the April 21, 1947, holding of the Court of Appeals for the District of Columbia in the *Panhandle East-*

ern suit for a direct judicial review of the November 30 order which held that "the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders," and on that ground said Court dismissed Panhandle Eastern's petition for review "without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final; * * *." (R. 704.) Said court gave clear recognition to the fact that the order of November 30 showed on its face that it was no to become final or represent final action on the part of the Commission until the order referred to in it as the "supplemental order" had been issued by the Commission.[1]

The decision of the Court of Appeals for the District of Columbia, dated April 21, 1947, was a final judgment and decision. *Wilson v. Republic I. & S. Co.*, 257 U. S. 92, 96. It was obviously predicated on the well settled rule that only final orders of administrative agencies are subject to judicial review. *Federal Power Commission v. Metropolitan-Edison Co.*, 304 U. S. 375, 383-385. Its necessary legal effect was that the November 30 order did not presently issue a certificate. If said order had on that date issued a certificate, it obviously would have been subject to judicial review.

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[1]The April 21, 1947, decision is not to be confused with the June 3, 1948, decision of said court, 169 F. (2d) 881, on Panhandle's second petition for review filed (see Commission's docket entry of July 3, 1947, R. 734) after the supplemental order and opinions were issued.

That the judgment of April 21, 1947, had the legal effect of holding that the November 30 order did not issue a certificate on its date is believed to be settled by the decisions of this Court in *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310; and *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103, 110-113 (the minority opinion concurring on this point, 333 U. S. 116). Until the order of an administrative agency is complete and final, it does not grant or withhold any authority, privilege or license. (The *Chicago & Southern Air Lines* case, 333 U. S. 112-113, citing *United States v. Los Angeles*, *supra*, and other cases.) Only an order which is *final*, and therefore has reached the stage where a review of it could be *sought* and *pursued*, could be effective as the grant and issuance of a certificate—"for only then was the decision *consummated*, announced and available to the parties," and until then "it grants no privilege and denies no right. It can give nothing and take nothing away from the applicant or a competitor." (Majority opinion in *Chicago & Southern Air Lines* case, 333 U. S. 110-111.) And only then "has the basis been laid for issuance of certificates." (Minority opinion same case, 333 U. S. 116.)

The adjudication by the Court of Appeals for the District of Columbia that the order of November 30, 1946, was not final "because it required for completion the issuance of a supplemental order or orders" is tantamount to an adjudication that said order of November 30, 1946, did not have on its date the legal effect of granting any right or privilege to Michigan-Wisconsin to construct and operate its

proposed pipe line; that is, it did not grant or issue a certificate of public convenience and necessity and would not do so unless and until it should be completed by the issuance of a supplemental order or orders making it final.

As the basis for the holding of the Court of Appeals in the instant case that the November 30 order issued a certificate on its date, it held that the present tense language in Paragraph (A) of said order, considered with subsequent statements of the Commission that it issued a certificate on November 30, showed a clear intention to issue the certificate on that day and by that order. (R. 722-723.) It further held that Paragraph (C) (*ante*, p. 12) in said order was intended by the Commission only to postpone the filing of an application for rehearing with respect to the limitations contained in Paragraph (B) (viii) of said order relating to service in the Detroit and Ann Arbor markets. (R. 726.) Both of these holdings are in conflict with the April 21, 1947, decision, because that decision, by necessary implication, interpreted Paragraph (C) as intending to provide (as its plain and unmistakable language does provide) that the November 30 order as a whole should be withheld from issuance and suspended for the purpose of filing applications for rehearing of said order as a whole until the issuance of the opinions and the supplemental order. It also had the effect of holding that the present tense language in Paragraph (A) of said order was not intended to speak and have effect until the opinions and supplemental order should be issued and of holding that the subsequent statements of the Commission that it had

issued a certificate on November 30 were mere erroneous legal conclusions.

This Court denied writ of certiorari in the *Panhandle Eastern* case. (332 U. S. 762.) The Commission filed a brief in opposition to Panhandle Eastern's petition for certiorari. We assume the Court will take judicial notice of the proceedings had in this Court in that case. (Case No. 147, October Term, 1946.) Hence, we deem it proper to refer to the Commission's brief wherein it asserted that the November 30 order was not final and that additional action "was necessary to complete the administrative action." We quote from the Commission's brief filed in this Court the following:

"The Court below, upon its own motion, dismissed Panhandle's petition for review because it found that the issuance by the Commission of an order supplemental to those included in such petition was necessary to complete the administrative action. This supplemental order was that which was provided for by the Commission in subparagraph (B) (viii) of its order of November 30, 1946, issuing the certificate to Michigan-Wisconsin. The purpose of such supplemental order was to determine the rights and duties of petitioner in the Detroit and Ann Arbor markets. Prior to issuance of such supplemental order the Commission had not determined to what extent the facilities for which a certificate had been issued to Michigan-Wisconsin could be used for the transportation and sale of gas for resale in the Detroit and Ann Arbor markets.

"* * * The administrative process was thus not complete, and the Commission's orders which were before the court were not reviewable. Federal Power Commission v. Metropolitan-Edison Company, 304

U. S. 375 and cases cited at 384-385." (Brief referred to, pp. 9-10.)

The position thus taken by the Commission in the *Panhandle Eastern* case emphasizes the clear conflict between the decision in that case and the decision in the instant case in respect to the status of the order of November 30, 1946. It was decided in the *Panhandle Eastern* case that said order was not a final order and constituted only incomplete administrative action. The instant case held to the contrary.

3. The April 21, 1947, decision of the Court of Appeals for the District of Columbia was binding on the Commission and conclusively determined in the certificate proceeding that no certificate was issued on November 30, 1946. It therefore settled that issue in the instant case.

The April 21 decision was rendered in a proceeding for a direct review of the November 30 order by a court having statutory jurisdiction to review said order. That decision was binding upon the Commission.[1] The parties to petitioners' contracts in effect agreed to abide, and therefore were bound, by the result of the proceedings before the Commission. (R. 36-38; 41.) *Bank of Commerce v. City of Louis-*

[1]Napa Valley Electric Co. v. Railroad Commission of California, 251 U. S. 366; Federal Power Commission v. Pacific Power & Light Co., 307 U. S. 156, 160; Interstate Commerce Com. v. Baird, 194 U. S. 25, 28; Federal Communications Com. v. Pottsville Broadcasting Co., 309 U. S. 134, 145; Louis Eckert Brewing Co. v. Unemployment Reserves Com. (Calif.), 119 P. (2d) 227, 228.

ville (Taft, Cir. J.), 88 F. 398, 405-407 (reversed on another point, 174 U. S. 412); *Rapelye v. Prince*, 4 Hill (N. Y.) 119, 40 Am. Dec. 267; *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619; *Brown v. Sprague*, 5 Denio (N. Y.) 545. In its decision the Court of Appeals in the instant case failed and refused so to hold, although the November 30 order was only collaterally involved in the instant case, whereas it was directly involved in the District of Columbia case. The question as to whether the April 21, 1947, decision conclusively established the character and status of the November 30 order for all purposes of the instant case presents an important question of both judicial and administrative procedure which this Court should review and determine.

4. The order of November 30, 1946, was not in effect on that date, or on December 2, 1946, when the termination notices were sent, as a certificate then authorizing "the construction and operation" (the language of the contracts) of the proposed pipe line. It did not then presently grant Michigan-Wisconsin right and authority to begin the construction and operation of the pipe line and therefore was not such a certificate as satisfied the termination clause of the three contracts.

Petitioners have heretofore quoted the termination clause of their three contracts with respondent. (Petition, pp. 2-3.) They have also stated the facts concerning the order dated November 30, 1946, and have set out its principal provisions. (Petition, pp. 9-12.)

The primary question on the merits arising under the pleadings and evidence is whether said order of November 30, 1946, was on that date such an order (immediately effective as the issuance of a certificate) as satisfied the termination clause of the three contracts and destroyed the right of petitioners to terminate them. We say "on that date" because the notices to terminate were sent on December 2, 1946, and there is no claim that prior thereto any order was made other than said order of November 30, 1946. If that order did not become effective on that date, as the order described in the contracts, then the right to terminate admittedly existed when the telegrams of termination were sent.

In Section 2 of Article II of the contracts between respondent and petitioners, petitioners were given the benefit of any termination by Phillips pursuant to the terms of its contract with Michigan-Wisconsin. In addition, petitioners reserved the right to terminate their contracts by written notice delivered at any time after December 1, 1946, and before the issuance to Michigan-Wisconsin of "a certificate of public convenience and necessity for the construction and operation of its pipe line." (Petition, pp. 2-3.) Under the conditions set forth in said order of November 30, 1946, it was not on that date an order then authorizing Michigan-Wisconsin to begin the construction of, and later to operate, a pipe line. That right was to accrue only after the Commission had taken (in the so-called supplemental order or orders) additional administrative action of a discretionary nature. This action involves the exercise by it of the same administrative discretion that it ex-

ercised in making said order of November 30, 1946. The order of November 30, 1946, on its face showed that it represented only partial or incomplete administrative action and that additional administrative action on the part of the Commission itself and on the part of other administrative bodies referred to was required to make it final and to mature in Michigan-Wisconsin the right to construct and operate the pipe line. Unless these additional administrative actions were taken by the Federal Power Commission and other administrative bodies, Michigan-Wisconsin would never, under the order of November 30, 1946, have the right to construct and operate the pipe line.

Respondent and petitioners had contracted, as is evident from the language of their contracts, in contemplation of a certificate presently authorizing the construction and operation of a pipe line, and this appears from the words used in the contracts—"a certificate of public convenience and necessity for the construction and operation of its pipe line."

Let it be supposed that the order of November 30, 1946, had expressly provided that it should not become effective until one, or five, or ten years after date. Clearly it would not be such a certificate as was contemplated by petitioners and respondent when they entered into the contracts. The conditions imposed made the order just as ineffective presently to authorize the construction and operation of the pipe line as it would have been if the order had provided that it should be effective two years from date.

At the time of the pre-trial conference the Wisconsin authorizations had not been secured. (R. 217-

218.) If never secured, would the order of November 30, 1946, nevertheless then constitute a certificate of public convenience and necessity within the meaning of the contracts, bearing in mind that the contracts provided for a certificate of convenience and necessity authorizing the construction and operation of a pipe line, while the order of November 30 provided that the facilities should not be used for the transportation and sale of gas until such authorizations were obtained?

The Commission found in sub-paragraph (4) of the findings in the order of November 30, 1946, that the project could be "neither financed, constructed, nor operated" without Michigan-Wisconsin's securing the necessary authorizations from the State of Wisconsin and the communities to be served therein and the necessary approval by the Securities and Exchange Commission of its plan of financing. (R. 440-441.)

Manifestly the parties did not contemplate that the gas covered by the contracts should be indefinitely tied up while petitioners awaited the efforts of Michigan-Wisconsin to obtain, after December 1, 1946, such further action by the Federal Power Commission and state administrative agencies as was necessary to make the order of November 30, 1946, effective as authorization for the construction and operation of a pipe line.

It is no answer to say that the Commission is given power to impose conditions in issuing certificates. The contracts clearly contemplated and required a completely effective certificate that would *entitle* Michigan-Wisconsin to "construct and oper-

ate" the proposed pipe line and unless such a certificate was issued on or before December 1, the petitioners would have the right to terminate their contracts, provided they gave notice of termination prior to the issuance of "such certificate." It would be unreasonable to impute to the parties to the contracts an intention to make a contract for the sale of gas under which the purchaser could delay performance for an indefinite period of time—even for years—and at the same time hold the gas under the contracts and prevent its being marketed to others.

Petitioners do not depend upon the non-performance of the so-called conditions set forth in the order, but rather they depend upon the nature of the order as so conditioned. These conditions were of such a character that Michigan-Wisconsin might never be able to operate a pipe line, with the result that respondent would never be able to take gas under the contracts; or the delivery of gas might be delayed so long in awaiting the performance of the conditions that the value of petitioners' reserves would be destroyed by drainage to the lands of others.

To defeat the right to terminate, it was necessary under the plain language of the contracts that Michigan-Wisconsin obtain, on or before December 1, 1946, *authority* to construct and operate its proposed pipe line, or petitioners at any time after that date would have the right to terminate their respective contracts. Under the contracts, to defeat the right of termination, it was not enough that the Commission should issue a piece of paper called a certificate of public convenience and necessity; it was necessary

that the Commission presently grant to Michigan-Wisconsin the *right and authority* to begin the construction and operation of the pipe line. The contracts dealt with actualities and not with bare formalities devoid of legal effect. Michigan-Wisconsin was to get not merely a so-called certificate but was to acquire on or before December 1, 1946, the present *right and privilege* to construct and operate the proposed line.

The order of November 30, 1946, in effect provided that the *right* to construct and operate the pipe line might be enjoyed at some later time, if and when the Commission, in the exercise of its discretion might take later action; that is, might issue another order, called "supplemental order" in the order of November 30. Such a so-called certificate clearly did not satisfy the contracts.

Arguendo, we assume the power of the Commission to provide that the certificate should consist *in part* of one order and *in part* of a "subsequent order," especially where the Commission in the first order expressly states that its effectiveness is to be delayed pending the "issuance" of the second order. It was open to the Commission to divide the certificate into two parts, one part made on November 30, 1946, and the remaining part made on March 12, 1947, when the order, denominated in the order of November 30 as the "supplemental order," was issued. But the Commission had no power to change the *contracts* made by respondent and petitioners. These contracts called for an order that was to be in full force and effect at any and all times

after December 1, 1946. To be *in effect* it was necessary that the order should presently grant the authority to construct and operate the line. To delay the grant of that *authority* was to delay the *effectiveness* of the so-called certificate.

We assume the power of the Commission to delay the effective date of such a certificate for one year, two years, or ten years. But a certificate, the *effectiveness* of which as a grant of authority was delayed by the Commission beyond December 1, 1946, would not satisfy the contracts. Here the effective date of this certificate order was to be delayed until the Commission had conducted another hearing and had issued what is designated in the record as the supplemental order. The supplemental order was not issued until March 12, 1947. It is, therefore, plain that Michigan-Wisconsin did not acquire from the Federal Power Commission a certificate of public convenience and necessity on or prior to December 2, 1946. This being true, the right to terminate then vested in petitioners.

It is immaterial that the certificate order declares that a certificate of public convenience and necessity is "hereby issued." That declaration is without effect when considered alongside the fact that the applicant did not acquire on or before December 2 the *right* to construct and operate the line.

What may be called the "present tense" or "label" argument cannot prevail. A declaration that the certificate is "hereby issued" can have no effect in the face of the fact that the order did not presently and immediately grant the right and authority to con-

struct and operate the line. Giving something a name cannot fix or change its character as created by actual fact. Mere terminology is never controlling. *Columbia Broadcasting System v. United States*, 316 U. S. 407, 416; *G. H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 227 (per Mr. Justice Holmes); *Dawson v. Kentucky Distilleries Company*, 225 U. S. 288, 292 (per Mr. Justice Brandeis). "We look behind the name to the thing named, its character, its relations, and its functions, to determine its position, and not the mere title under which it passes." *Beach v. Leahy*, 11 Kan. 23 (per Mr. Justice Brewer). Stating that a certificate is "hereby issued" does not change the fact that the order did not presently and immediately grant right and authority to construct and operate the proposed line.

5. The Court of Appeals erred in holding that the district court did not abuse its discretion in refusing to dismiss or abate, or, in the alternative, to stay this action.

We adopt here the statement made a part of the "Summary Statement," *ante*, pp. 7-8. The following authorities are believed to be applicable:

Brillhart v. Excess Ins. Co., 316 U. S. 491;
Indemnity Ins. Co. v. Schriefer, 142 F. (2d) 851;
Ætna Casualty Co. v. Quarles (4th Cir.), 92 F. (2d) 321;
Maryland Casualty Co. v. Consumers Finance Service (3rd Cir.), 101 F. (2d) 514;
American Automobile Ins. Co. v. Freundt (7th Cir.), 103 F. (2d) 613.

This Court in *Brillhart v. Excess Ins. Co., supra,* used the following language:

"The motion rested upon the claim that, since another proceeding was pending in a state court in which all the matters in controversy between the parties could be fully adjudicated, a declaratory judgment in the federal court was unwarranted. The correctness of this claim was certainly relevant in determining whether the District Court should assume jurisdiction and proceed to determine the rights of the parties. Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." (316 U. S. 494-495.)

It is plain that the respondent is seeking to use the declaratory judgment remedy for an improper purpose; that is, to make a new choice of tribunals. It made its first choice when it attempted to remove the Texas actions to the United States District Court for the Western District of Texas. After invoking the jurisdiction of that Court—a court of the United States—it was clearly not entitled to go into another United States court and seek the identical relief that it could obtain defensively, if not affirmatively, in the Texas actions.

In *American Automobile Ins. Co. v. Freundt,* 103 F. (2d) 613, the Circuit Court of Appeals for the Seventh Circuit said:

"The Supreme Court has held that the Declaratory Judgment Act is not jurisdictional but procedural only; and that it merely grants authority to courts to use a new remedy in causes over which they have jurisdiction. The roots of declaratory procedure are found in equity procedure, chiefly in the *quia timet* relief. The wholesome purpose of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum. It was not intended by the act to enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the *removal act*, and such would be the result in the instant case." (103 F. (2d) 617.)

What the respondent attempted to do in this case, in effect, was to remove the two actions filed in the Texas state court, and first removed by it to a federal court in Texas, from that court to a federal court in Oklahoma. It had already made one choice of tribunals and by this action it seeks to make a new choice, reversing the choice already made by it in Texas.

This case is unlike any other reported case. The action was filed July 15, 1947. (R. 11.) The State court actions previously filed by Skelly and Stanolind were filed (Skelly's) May 21, 1947 (R. 78), and (Stanolind's) May 20, 1947 (R. 89). Both were removed to the federal court in Texas on June 16, 1947 (R. 81, 92), and therefore both were pending on removal by Phillips in the United States District Court for the Western District of Texas when this action was filed in Oklahoma. These facts raise the

question of whether Phillips, after invoking the jurisdiction of the federal court in Texas, had the right to file this action involving the same matter in a federal court in Oklahoma.

Conclusion

It is respectfully submitted that this case calls for the exercise of the supervisory powers of this Court and that the writ should be allowed.

Respectfully submitted,

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BRIEF FOR PETITIONERS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 221

SKELLY OIL COMPANY, ET AL.,
Petitioners

vs.

PHILLIPS PETROLEUM COMPANY,
Respondent

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BRIEF FOR PETITIONERS

I.

Opinion of the Court of Appeals

The opinion of the United States Court of Appeals for the Tenth Circuit is reported under the style of *Skelly Oil Co., et al. v. Phillips Petroleum Co.*, 174

F. (2d) 89, and it appears in the record at pages 708-728.[1]

II.

Jurisdiction of This Court

Jurisdiction of this Court is invoked under Title 28, United States Code, Secs. 1254(1) and 2101. The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 28, 1949. (R. 707.) Petition for rehearing was duly filed and entertained, and rehearing was denied on May 9, 1949. (R. 732.)

III.

Statement of the Case

This suit was filed in the United States District Court for the Northern District of Oklahoma by respondent against petitioners for a declaratory judgment and other relief. (R. 3.) Judgment was there rendered for respondent. (R. 177.) It was affirmed on appeal. On October 17, 1949, this Court granted petitioners' petition for writ of certiorari.

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[1]It was necessary to reprint the record in this Court and petitioners have been advised by the clerk that the work of reprinting the record will not be completed by the time petitioners are required to file their brief. Accordingly, the record references made in this brief are to the record as printed in the Court of Appeals. The clerk has further advised the petitioners that the paging of the record as printed in the Court of Appeals will be carried on the margin of the record as printed in this Court.

On December 5, 1945, Skelly Oil Company and Stanolind Oil and Gas Company, and on December 7, 1945, Magnolia Petroleum Company (hereafter called Skelly, Stanolind and Magnolia, respectively, and sometimes called petitioners) entered into separate contracts with Phillips Petroleum Company (hereafter called Phillips and sometimes called respondent) for the sale by petitioners, respectively, and the purchase by Phillips of gas to be produced from the leases of the respective petitioners in the Hugoton field in Texas and Oklahoma. (R. 36-62.)

In the preamble to each of the three contracts it was stated that Michigan-Wisconsin Pipe Line Company (hereafter called Michigan-Wisconsin) desired to obtain from the Federal Power Commission "a certificate of public convenience and necessity under the requirements of the Natural Gas Act for a pipe line system which it proposed to construct and operate." (R. 36.) It was further recited (R. 37) that Phillips was in the process of negotiating a contract with Michigan-Wisconsin wherein Michigan-Wisconsin would agree to purchase within limits its requirements of gas from Phillips.

Certain provisions, later included in the contract between Phillips and Michigan-Wisconsin, were set forth in each of the contracts between Phillips and petitioners with the statement that it was proposed that they would be included in the Phillips-Michigan-Wisconsin contract. These provisions (R. 37-38) enumerated certain contingencies upon the occurrence of any one of which Phillips would have the right to terminate its contract with Michigan-Wisconsin. The first of these was the failure of Michi-

gan-Wisconsin to procure from the Commission on or before September 1, 1946, a certificate of public convenience and necessity "for the construction and operation of the pipe line"; the second was the refusal of the Commission to grant a certificate; the third was the failure of Michigan-Wisconsin "to commence the actual construction of the pipe line on or before March 1, 1947"; and the fourth was the failure of Michigan-Wisconsin "to commence on or before January 1, 1948, the acceptance of deliveries of gas" for resale in communities east of the Missouri River. Upon the occurrence of any of the above events Phillips would have the right, upon written notice delivered not later than thirty days after the happening thereof, to terminate its contract with Michigan-Wisconsin. These provisions fixed a time schedule as between Phillips and Michigan-Wisconsin and secured to Phillips the right to terminate its contract with Michigan-Wisconsin upon failure of the latter to meet such time schedule. In the contracts between petitioners and Phillips these proposed provisions of the contract between Phillips and Michigan-Wisconsin were copied, showing that Phillips and petitioners contemplated that the time schedule so provided would be observed. And in Section 2 of Article II of each of the contracts between petitioners and respondent, reference was further made to this time schedule as between Phillips and Michigan-Wisconsin and contingencies stated upon which petitioners could terminate their respective contracts with Phillips.

Section 2 of Article II of each of the contracts between petitioners and respondent is as follows:

"*Section 2.* If the proposed contract between Buyer and Michigan-Wisconsin Pipe Line Company is not consummated on or before the first day of January, 1946, or if said contract is consummated and thereafter terminated upon the happening of one of the four contingencies hereinbefore quoted from said proposed contract, then and in either of those events either party shall have the right to terminate this contract by written notice to be delivered to the other party within thirty (30) days after the said first day of January, 1946, in case the said pipe line contract is not consummated, or within thirty (30) days after the termination of the pipe line contract as aforesaid; provided, however, that, in the event this contract shall not be terminated for any of the foregoing reasons on or before October 1, 1946, and in the event Michigan-Wisconsin Pipe Line Company shall fail to secure from the Federal Power Commission on or before that date a certificate of public convenience and necessity for the construction and operation of its pipe line, Seller shall have the right to terminate this contract by written notice to Buyer delivered to Buyer at any time after December 1, 1946, but before the issuance of such certificate. Immediately upon the occurrence of any of the events or contingencies hereinbefore mentioned in this Section 2 or in the event of the termination by Buyer herein of its contract with Michigan-Wisconsin Pipe Line Company, Buyer herein shall give Seller herein notice thereof by telegram, to be confirmed by letter." (R. 41.)

On December 11, 1945, the proposed contract between Phillips and Michigan-Wisconsin was executed. (R. 11-36.) Copies of the contracts between the respective petitioners and Phillips were attached to and made parts of said contract. (R. 15.)

On December 2, 1946, petitioners, acting under the above quoted provision of their respective contracts, separately gave respondent notice of the termination thereof for failure of Michigan-Wisconsin Pipe Line Company to secure from the Federal Power Commission a certificate of public convenience and necessity on or prior to the time mentioned in the termination provision. (R. 605-606.)

On July 15, 1947, respondent and Michigan-Wisconsin brought this action for declaratory judgment that said contracts had not been terminated. (R. 3-11.) After praying for declaratory relief, respondent further prayed that petitioners and each of them be enjoined from further asserting or contending that a certificate of public convenience and necessity was not issued by the Federal Power Commission to Michigan-Wisconsin and from further asserting that any of the petitioners was not bound by its contract with the respondent. (R. 11.)

1. *The Pleadings Relating to Jurisdiction.*

Diversity of citizenship does not exist as between Phillips and all of the defendants. (R. 3-4.) In the complaint, respondent claimed jurisdiction upon the ground that the case was one arising under a law of the United States. (R. 9-10, 103-106.)

The allegations of the original complaint relied upon by respondent to show jurisdiction under Sec 41, Title 28 (now Sec. 1331), are:

(1) That on December 5, 1945, and December 7, 1945, Phillips entered into certain contracts with

the petitioners, respectively, as above stated. (Par. 5, R. 5.)

(2) That on December 11, 1945, Phillips and Michigan-Wisconsin entered into a contract whereby Phillips contracted to supply Michigan-Wisconsin certain gas, including the gas to be purchased under said contracts of December 5, 1945, and December 7, 1945. (Par. 6, R. 5.)

(3) That Michigan-Wisconsin instituted proceedings before the Federal Power Commission for a certificate of convenience and necessity, and on November 30, 1946, the Commission made an order granting the application of Michigan-Wisconsin, and on said date issued the certificate and caused notice thereof to be given on that date. (Pars. 6, 7 and 8, R. 6-7.)

(4) That petitioners assert that no certificate within the requirements of the Natural Gas Act was secured by Michigan-Wisconsin, and that petitioners have misconstrued the Act. (R. 9, 10.)

(5) That each petitioner, on December 2, 1946, sent written telegraphic notice of termination to Phillips. (No question is raised as to the sufficiency of these notices, the issue being as to whether the right to terminate existed at the time the notices were sent.) (R. 7, 8.)

(6) Petitioners having duly filed their motions to dismiss for want of jurisdiction, assigning as grounds that the case was not one arising under a federal law (Skelly, R. 66; Stanolind, R. 95; Magnolia, R. 101), the respondent filed its "Amendment

to Complaint" (R. 103) and alleged that the action was one arising under the Natural Gas Act (R. 104), and in support of that claim made the following averments:

"The plaintiffs assert and allege that the actions of said Federal Power Commission on November 30, 1946, constituted the issuance on said date of a certificate of public convenience and necessity under the requirements of the Natural Gas Act. Said Act provides in Section 717n (b) that 'All hearings, investigations and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission' and in Section 717o that 'Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe.' Under the procedure of said Commission then in effect pursuant to the terms and provisions of said Act, and particularly those sections last mentioned, the actions and proceedings of the Commission did constitute the issuance by the Commission of a certificate of public convenience and necessity on November 30, 1946, and did constitute the issuance of such a certificate prior to said telegraphic notices by the defendants to the plaintiff Phillips on December 2, 1946. The defendants contend and assert otherwise and in doing so they fail to properly construe, or to give appropriate effect to, said Act and the rules, regulations and procedure of said Federal Power Commission then in effect pursuant to the terms and provisions of said Act." (R. 105.)

Plaintiffs attached to said amendment as Exhibit 2 a copy of the order of November 30, 1946. (R. 105.) This order appears in the record at pages 439-445.

(7) Respondent further alleged that the certificate issued to Michigan-Wisconsin "contained certain conditions, by reason of which the defendants contend that the certificate of public convenience and necessity issued to said plaintiff pipe line company * * * was insufficient and entitled the defendants to terminate the said contracts" (R. 105-106); and that the contentions of the petitioners "necessarily bring into play and call for the construction" of the Natural Gas Act and it again asked for declaratory relief to the effect that the petitioners have no right to terminate any of said contracts. (R. 106.)

2. *Petitioners' Contention as to Jurisdiction.*

It was the contention of petitioners (1) that if the Natural Gas Act and the rules and regulations of the Power Commission were involved at all, it was only because of the defenses which respondent alleged petitioners would assert, and because of the matters relied upon by respondent, as plaintiff, to avoid the legal effect of these defenses; that is, that the case falls under the rule that a plaintiff cannot create original federal jurisdiction by anticipating a defense and alleging matters in avoidance that involve the decision of federal questions; and (2) that the case "arises" under the contracts, and particularly under the termination clauses of the contracts (hereinbefore quoted) and not under the Natural Gas Act. (R. 66, 95, 101.)

3. *Controlling Facts on the Merits of the Case.*

The primary issue on the merits was whether the Commission, by adopting its order of November 30,

1946, issued on that date a certificate of public convenience and necessity to Michigan-Wisconsin authorizing it to construct and operate its proposed pipe line; and if so, whether it was then effective to authorize it to construct and operate said pipe line and thereby satisfied the termination provisions of petitioners' contracts with the respondent. Respondent contended, as above shown, that it did. Petitioners contended that it did not. (Answer of petitioners, Skelly R. 108-113; Stanolind R. 122, 125-131; Magnolia R. 132, 135-142.)

The clause of the contracts between petitioners and respondent authorizing petitioners to terminate (by notice) each of said contracts at any time after December 1, 1946, but before the issuance by the Federal Power Commission to Michigan-Wisconsin of a certificate of public convenience and necessity for the "construction and operation of its pipe line," is quoted above. (*Ante*, p. 5.)

The order of the Federal Power Commission which respondent relied upon as satisfying the terms of the above quoted provisions of the contracts between petitioners and respondent, but which petitioners contend did not do so, was dated November 30, 1946. Its pertinent provisions (R. 439, 441-445), after setting forth some eight findings, are divided into paragraphs (A), (B), and (C). Paragraphs (A) and (B) contain several sub-paragraphs. Paragraph (A) provided:

"A certificate of public convenience and necessity be and it is hereby issued to Applicant, upon the terms and conditions of this order, authorizing it (Michigan-Wisconsin) to:" construct and operate

certain gas transmission pipe line facilities generally described in the sub-paragraphs of Paragraph (A). (R. 441-2.)

Paragraph (B) provided: "This certificate is granted to applicant upon the following terms and conditions:" and these terms and conditions are set forth in twelve sub-paragraphs. (R. 442-445.)

While in Paragraph (A) the Commission stated that "A certificate of public convenience and necessity be and is hereby issued to Applicant," the Commission also stated that it was issued "upon the terms and conditions of this order." Certain of the conditions had the effect of postponing indefinitely any right of Michigan-Wisconsin to use the proposed pipe line for the transportation or sale of gas in interstate commerce pending later administrative action to be taken by the Commission or other administrative bodies. Such conditions are summarized as follows:

(1) "There shall be no transportation or sale of natural gas * * * by means of the facilities herein authorized until all necessary authorizations" have been obtained from the state of Wisconsin and the communities proposed to be served in said state. (Par. (ii); R. 442.) None of said authorizations had been obtained at the time (February 17, 1948, R. 184) of the pretrial conference in the District Court (R. 217-218.)

(2) "Applicant shall obtain approval of its proposed plan of financing by the Securities and Exchange Commission, and the grant of the certificate

herein authorized shall be without prejudice to any action which may be taken by that Commission." (Par. (iii), R. 443.)

Finding (4) (R. 440-441) was that without the authorizations provided for in paragraph (ii) (item "1" above) and (iii) (this item "2") the project can "neither be financed, constructed nor operated." (It was not until in November and December, 1947, R. 608 *et seq.* and 618 *et* seq., that the first partial approval of the financing was given by the Securities and Exchange Commission. It was not until December 10, 1947, that construction of the pipe line was commenced. Trial court's finding 17, R. 175.)

(3) "The facilities referred to in Paragraph (A) (2) above (facilities located in the Austin and Reed City Storage Fields) shall not be used for the transportation or sale of natural gas, subject to the jurisdiction of the Commission," except upon approval by the Commission of a contract between Michigan-Wisconsin and Michigan Consolidated Gas Company to be filed with the Commission on or before December 16, 1946. (Par. (iv); R. 443.)

(4) "There shall be no transportation or sale of natural gas * * * by means of facilities herein authorized" unless an application for a certificate of public convenience and necessity is filed within fifteen days by the Austin Field Pipe Line Company and a certificate granted by the Commission for the construction and operation of facilities necessary to transport certain required volumes of gas. (Par. (v); R. 443.)

(5) "There shall be no transportation or sale of natural gas * * * by means of the facilities herein authorized" until a proper application for a certificate of public convenience and necessity is filed by Michigan Consolidated Gas Company for the construction or operation of certain additional facilities in the Austin and Reed City Storage Fields. (Par. (vi); R. 443.)

(6) "This certificate is granted upon the express condition that the facilities herein authorized shall not be used for the transportation for or sale of gas to Michigan Consolidated Gas Company for resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern," which rights and duties were to be determined by supplemental order to be issued by the Commission. (Par. (viii); R. 444.) This supplemental order was not issued until March 12, 1947, long after the termination notices were sent and received. (R. 555-7.)

(7) Paragraph (ix) provided that Michigan-Wisconsin should within fifteen days after issuance of the supplemental order provided for in paragraph (viii) notify the Commission whether the certificate was acceptable to it (R. 444.)

Paragraph (C) of said order provided (R. 445) that:

"For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

The first of the opinions here referred to was issued February 7, 1949. (R. 476-519.) A supplemental opinion (R. 536-555) and the supplemental order were dated February 20, 1947, and issued March 12, 1947. (R. 555-557.)

Petitioners contend that Paragraph (C) suspended the order as a whole until March 12, 1947, when the supplemental order therein referred to was issued.

4. *As to the Motions Filed by Skelly and Stanolind.*

It was made to appear in motions filed by Skelly and Stanolind that prior to the filing of this federal court action, Skelly and Stanolind had separately filed on May 20 and 21, 1947, in a state court in Travis County, Texas, actions against the Phillips Petroleum Company, each setting forth the making of its contract with Phillips, notice of termination thereof, and the resultant controversy as to whether the termination was effective—the identical subject matter involved in this action. In each of these actions Skelly and Stanolind sought a declaratory judgment to the effect that under the terms of said contract and under the facts existing when the notice of termination was given the right to terminate then existed and that each plaintiff was no longer obligated by any of the terms or provisions of the contract. (Skelly's petition in state court, R. 69-77; Stanolind's, R. 82-88.) In their consolidated motions filed in this action Skelly and Stanolind each included a motion to dismiss or abate, or, in the alternative, to stay this action until the Texas actions

above referred to were disposed of. (Skelly motion, R. 67; Stanolind's, R. 97.) These motions were overruled. (R. 107.) It further appears from the exhibits attached to said motions that in each of said state court actions Phillips filed its petition for removal to the United States District Court for the Western District of Texas (Skelly suit, R. 79; Stanolind suit, R. 90) and that orders of removal were entered on June 6, 1947 (R. 89, 92), and that thereafter the record in each of said actions was filed in the federal court in Texas, and that each of said actions was pending in the federal court in Texas at the time respondent filed this action in the federal court for the Northern District of Oklahoma, on July 15, 1947. (R. 11.)

5. *The Decision Below.*

The Court of Appeals in affirming the judgment of the District Court held that the order of November 30, 1946, issued the certificate on its date and that it was immediately effective. (R. 722-723.)

The Court held that Paragraph (C) of said order was intended by the Commission to relate only to an application for rehearing with respect to the limitation with reference to the Detroit and Ann Arbor service areas in sub-paragraph (viii) of Paragraph (B) to be more particularly defined by a supplemental order. (R. 726.)

6. *Conflict Between this Decision and a Prior Decision of the United States Court of Appeals for the District of Columbia.*

Panhandle Eastern Pipe Line Company, herein referred to as Panhandle Eastern, was a party to

the proceedings in which the order of November 30, 1946, was entered by the Commission. Panhandle Eastern and other parties to said proceedings, within thirty days after the adoption of that order, filed their applications for a rehearing of the same (R. 369.) These applications were denied by the Commission January 14, 1947 (R. 694-696) on the sole ground that they were prematurely filed because filed in advance of the issuance of the opinions and supplemental order provided for in Paragraph (C). On February 7, 1947 (R. 733), and prior to the issuance of the opinions and supplemental order before referred to, Panhandle Eastern filed its petition for review of the November 30 order in the United States Court of Appeals for the District of Columbia in a proceeding entitled *Panhandle Eastern Pipe Line Company, Petitioner, v. Federal Power Commission, Respondent.* The said Court entered its order on April 21, 1947, dismissing the petition for review upon the ground "that the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders," this having reference to the supplemental order above referred to. (R. 704.) Panhandle Eastern then applied to this Court for certiorari and its petition was denied. (332 U. S. 762.)

Petitioners contend that the decision of the Court of Appeals in the instant case is in clear conflict with the decision of the Court of Appeals for the District of Columbia in respect to the status of said order of November 30, 1946, the latter court having distinctly held that it was not a final order and did not then represent completely effective administra-

tive action and, being a decision on direct review, it was binding on the parties and conclusive of that question in this suit.

IV.

Specification of Errors Intended To Be Urged

These errors are covered by the Statement of Questions Presented and Reasons for Allowing the Writ as presented in the Petition for Certiorari, pp. 15-18.

1. The Court of Appeals erred in holding that original federal jurisdiction existed in this case under Title 28, U. S. C. A., Sec. 41 (now Sec. 1331) and in that connection erred in holding that the action was not one arising under the contracts and state law but was one arising under the Federal Natural Gas Act and the rules and regulations of the Federal Power Commission.

2. The Court of Appeals erred in holding that said order of November 30, 1946, satisfied the termination clauses of the three contracts and constituted the issuance of such certificate of public convenience and necessity as was contemplated by said contracts and on that date defeated the right to terminate said contracts.

3. The Court of Appeals erred in failing to hold that the adjudication made by the Court of Appeals for the District of Columbia in the Panhandle Eastern suit against the Commission (this Court denying certiorari, 332 U. S. 762) adjudicated the

status of said order of November 30, 1946, as not being a final order and as representing on that date only incomplete administrative action and therefore one which was not then effective to grant or issue a certificate.

4. The Court of Appeals erred in holding that the district court did not abuse its discretion in refusing to abate or dismiss this action because of the pendency of other actions in the District Court of the United States for the Western District of Texas, previously filed and seeking declaratory relief in respect to the same matter; or, in the alternative, to stay this action until the other actions were disposed of.

V.

Summary of Argument

1. In this action for declaratory judgment respondent anticipated that the defenses would involve a construction of the Natural Gas Act and orders of the Federal Power Commission, and attempted to show jurisdiction in the district court by alleging what it supposed petitioners would set up in defense of the action and by attempting to show that such defense would be without merit. A plaintiff cannot show jurisdiction in a federal court over a cause by anticipating and alleging that the defendant will rely upon the construction of federal statutes as a defense. The federal nature of the action must be shown from the plaintiff's statement of his claim. The Declaratory Judgment Act did not extend the jurisdiction of federal courts to classes of cases not

already within their jurisdiction. It only afforded an additional remedy for use in cases over which federal courts already had jurisdiction. The statute cannot be resorted to for the purpose of attempting to secure a judgment establishing the invalidity of an anticipated defense or over a case of which the federal courts would not have jurisdiction if coercive relief instead of declaratory relief were sought.

2. Each petitioner in its contract with respondent reserved the right to terminate the contract if Michigan-Wisconsin, on or before October 1, 1946, did not secure "a certificate of public convenience and necessity for the construction and operation of its pipe line," provided written notice of such termination was delivered to respondent at any time after December 1, 1946, "but before the issuance of such certificate." The sense of the contracts between petitioners and respondent was that unless an effective certificate presently authorizing the construction and operation of the pipe line by Michigan-Wisconsin had been issued by December 1, 1946, then petitioners could at any time thereafter and before the issuance of such certificate terminate their contracts. It appears from the face of the contracts that time was important, and the parties contracted with respect to a certificate effective as of December 1, 1946. Any order such as that of November 30, 1946, which was not effective presently to authorize the construction and operation of a pipe line and from which it could not be told when, if ever, such right or privilege would exist, did not satisfy the requirements of the contracts of the parties. The order of November 30, 1946, was not on December

2, 1946, effective to grant the right to construct and operate a pipe line and it could not on December 2, 1946, have been foretold that such order would ever be effective to grant such right or privilege.

3. There is a clear conflict between the decision of the Court of Appeals in the instant case on an important point of administrative law and the decision of the Court of Appeals for the District of Columbia on the same point and involving the identical Federal Power Commission order. The decision of the latter court is conclusive in this case. The Court of Appeals for the Tenth Circuit held that the order of November 30, 1946, issued a certificate on that date; that it was immediately effective; and that paragraph (C) of said order (quoted *ante*, p. 13) was intended to relate only to an application for rehearing with respect to the limitations imposed in subparagraph (viii) of Paragraph (B), "to be more particularly defined by supplemental order." (R. 726.) Panhandle Eastern Pipe Line Company, a party to the proceeding in which the order of November 30, 1946, was adopted, and other parties thereto filed their respective applications for rehearing with the Commission. (R. 396.) These applications were denied by the Commission on January 14, 1947, on the ground that they were prematurely filed because filed in advance of the issuance of the opinions and supplemental order provided for in Paragraph (C). (R. 694-696.) Panhandle Eastern filed its petition for review of the order of November 30 in the United States Court of Appeals for the District of Columbia in an action entitled *Panhandle Eastern Pipe Line Company*,

Petitioner, v. Federal Power Commission, Respondent. (R. 733.) On April 21, 1947, the Court of Appeals for the District of Columbia dismissed the petition upon the ground "that the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders," having reference to the supplemental order above referred to. (R. 704.) This Court denied certiorari. (332 U. S. 762.) That judgment is conclusive of the point that the order of November 30, 1946, was not a final order granting a certificate and fixing the rights of the parties. If it had granted a certificate it would have been subject to the review which was sought.

4. The Court of Appeals erred in holding that the district court did not abuse its discretion in refusing to dismiss or abate, or, in the alternative, to stay this action, since Skelly and Stanolind, prior to the filing of this case in the district court, had filed in a state district court in Texas a suit involving the same issues as are involved in this case, and respondent had removed that case to the District Court of the United States for the Western District of Texas.

ARGUMENT

Point One

The district court was without jurisdiction.

From the statement heretofore made it appears that the respondent, to support original jurisdiction in a court of the United States, under Title 28, Sec.

41 (now Sec. 1331), relied upon its statement of the defense which it alleged the defendants would or might assert and the allegations made by it in avoidance of that defense; in short, that respondent would rely on a federal statute in an attempt to avoid the defense.

If this action had been brought by respondent as one seeking coercive relief under the contracts (damages for breach or to compel specific performance), the Court would have had no jurisdiction. The rule is well established by the decisions of this Court that, where jurisdiction is claimed because of the presence of a federal question, that question must arise on plaintiff's own statement of his cause of action, and that the plaintiff is not entitled to create jurisdiction by anticipating a defense and seeking to avoid that defense by asserting that it is condemned by some federal statute, when properly construed. The leading case applying this rule is *L. & N. R. R. v. Mottley*, 211 U. S. 149. The rule has been applied in many other cases: *Tennessee v Union and Planters' Bank*, 152 U. S. 454; *Taylor v. Anderson*, 234 U. S. 74, and cases there cited.

The Mottleys brought their suit to enforce specific performance of their contracts with the Railroad Company and alleged the defense upon which the company was relying, and, further, that that defense was based upon a wrong construction of a federal law—the "Act to Regulate Commerce." Original jurisdiction was denied. Under the holding of the Court of Appeals in this case, if the Mottleys, after the enactment of the Declaratory Judgment Act, had brought their action as one for a declaratory

judgment, they could have maintained federal jurisdiction. The two cases cannot be distinguished except upon the theory that federal jurisdiction exists where there is resort to one remedy and does not exist where there is resort to a different remedy, the underlying right or cause of action remaining the same.

The Court of Appeals has, in effect, held that what may be called the Mottley rule or doctrine is not applicable because this action was one brought under the Declaratory Judgment Act. The Court in making that holding states that the action may be analogized to a suit to remove cloud from title. Such analogy does not exist. In a suit to remove cloud from title, the nature of the defendant's claim and its invalidity constitute essential parts of the plaintiff's cause of action. Defendant's claim creates a cloud. The removal of the cloud is the entire purpose of the suit. The allegations descriptive of the cloud are allegations setting forth the plaintiff's cause of action. In such a case the bill is not one to quiet title generally but "is one to remove a *particular* cloud from the plaintiff's title, as much so as if the purpose were to have a tax deed, a lease, or a mortgage adjudged invalid and cancelled" *Hopkins v. Walker*, 244 U. S. 486, 490, distinguished in *Barnett v. Kunkel*, 264 U. S. 16, 21.

Hopkins v. Walker, *supra*, does not hold that a plaintiff can create jurisdiction by anticipating a defense the avoidance of which requires the decision of federal questions. In that case it was held merely that, where the action is one to remove "a particular cloud" from the plaintiff's title, federal jurisdiction

exists if a proper description of the cloud brings federal questions under consideration. It is pushing analogical reasoning too far to hold, as the court below held in this case, that every denial by the defendant of plaintiff's right creates a cloud on that right. This action was not brought to remove a cloud from plaintiff's right under its contracts but was brought simply to enforce the contracts as plainly as if it had been brought as an action for damages.

In a declaratory judgment action, what the defendant may be claiming is no part of the plaintiff's case or right. In this case the plaintiff's cause of action is constituted by its contracts and by the defendants' refusal to recognize the existence of the contracts. Why the defendants refuse to recognize the contracts as binding on them is no part of the plaintiff's case. Federal jurisdiction in this action seeking declaratory relief cannot be created, any more than in any other case, by the nature of the defense asserted. It does not rest with the plaintiff to choose the defendants' defenses. Federal jurisdiction cannot be made to depend upon the choice of a defense either by the defendant or by the plaintiff for the defendant. *Taylor v. Anderson*, 234 U. S. 74, 75.

The Court of Appeals in its opinion states that "a factual element essential in an action for a declaratory judgment is the existence of an actual controversy" and that the description of this controversy is an essential part of the plaintiff's case. The ordinary case involves a "controversy" as to whether certain rights claimed by the plaintiff in fact exist. But here, as in the ordinary case, it is the plaintiff's

right, and not the defendants' reasons or excuse for denying that right, that constitute the plaintiff's case for jurisdictional purposes.

The fundamental idea underlying the rule declared in the *Mottley* case and similar cases is the lack of right on the part of the plaintiff to commit the defendant in advance to reliance on a particular defense. Plaintiff has no more right thus to commit the defendant in an action where declaratory relief is sought than in an action where ordinary coercive relief is sought. Filing a declaratory action, instead of waiting and later filing a coercive action, does not change the nature of the underlying right or cause of action.

In every case it is necessary for the plaintiff to obtain a judgment condemning the defendant's defense—all defenses upon which defendant relies. But that does not mean that the defenses constitute an affirmative part of the plaintiff's right or cause of action. Nor does it entitle the plaintiff to create jurisdiction by alleging in an anticipatory way that defendant is relying on a given defense and that the settlement of that defense in favor of the plaintiff will involve the decision of a federal question.

The Court of Appeals asserts that this action "is to secure an adjudication of an existing controversy" and that "it is not an action to enforce or construe the contracts of December 5 and 7, or for the breach thereof." (R. 721.) This, we submit, is plainly wrong. The action is one to obtain an adjudication that plaintiff's contracts are in full force and effect. It is one to enforce its rights under the contracts, in the way and to the extent permitted by the Declara-

tory Judgment Act. Obtaining a declaration that the contracts are in full force and effect is not the kind of enforcement that could be obtained in an action for damages but it is at least a partial enforcement. Obtaining that declaration, respondent can then go into a state court and file an action for damages or specific performance and rely upon the adjudication made in this case that the contracts are in full force and effect. The declaratory relief sought here is an essential part of respondent's effort to enforce the contracts.

After praying for declaratory relief respondent further prayed that petitioners and each of them be enjoined from further asserting or contending that a certificate of public convenience and necessity was not issued by the Federal Power Commission to said pipe line company, and from asserting or alleging that any of the petitioners was not bound by said contract with the respondent. (R. 11.)

All of respondent's rights stem from the contracts and not at all from the "controversy" concerning their continued existence. The cause of action is based upon the contracts and not upon the so-called controversy concerning their continued existence. Respondent must establish its case in this action in the same way as in an action for damages. It must prove the making of the contracts and their continued existence.

In the same connection the Court of Appeals further held that respondent's claim is not one "arising out of, or dependent upon, state law. Rather, it is a claim arising out of, and dependent upon, the construction and application of Federal law, to-wit,

the Act and the valid rules and regulations of the Commission promulgated thereunder." (R. 721.) This holding, we submit, is erroneous. Respondent's claim is based upon the contracts, which depend for their validity and legal effect wholly upon state law. Respondent is claiming no right granted to it by the Natural Gas Act or by the rules and regulations of the Commission.

In a declaratory judgment action, the plaintiff need allege no more than in an ordinary case; that is, that he has certain rights and that the defendant has denied the existence of these rights. The justifying reason, if any, asserted by the defendant—and the action is maintainable even if the defendant has no justifying reason—constitute no part of the plaintiff's case. The action is not brought to obtain an adjudication that the justifying reason or defense is untenable. The matter involved is whether plaintiff's claim or right exists; not whether the defense is good. The respondent was not required to allege any more than it would have been required to allege if it had elected to affirm that there was an anticipatory breach and had sued for damages or specific performance.

Had respondent thus proceeded, it would not have been required to allege any reason for the breach and would have been entitled to proceed in that way even if the petitioners had given no reason or had refused to give a reason. The same is true in this action for a declaratory judgment. In neither case can jurisdiction be made to depend upon the character of the reason assigned for the breach—or even lack of reason.

Absent diversity, federal jurisdiction of a declaratory action does not exist where the sole purpose of such action is to obtain a declaration that defendant's contentions involve the decision of federal questions and that these contentions are without merit. If successful, plaintiff could subsequently enter a state court with his suit for damages or specific performance (of which a federal court would have no jurisdiction), armed with a judgment that a particular defense which defendant might interpose is untenable. This is to do indirectly what cannot be done directly.

It has been held that "the operation of the Declaratory Judgment Act is procedural only" (*Ætna Life Insurance Co. v. Haworth*, 300 U. S. 227, 240); that the Act affords an "additional remedy for use in cases of which the federal courts already have jurisdiction" (*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 137 F. (2d) 176, aff'd 321 U. S. 590); that the Act is limited to cases "within the jurisdiction of the federal courts if affirmative relief were being sought" (*Southern Pacific Co. v. McAdoo* (C. C. A. 9), 82 F. (2d) 121; *Hary v. United Electric Coal Co.*, 8 F. Supp. 655, 656); that the Act should not be construed in such a way "as to encroach upon the state jurisdiction" (*Mutual Life Ins. Co. of New York v. Moyle*, 116 F. (2d) 434); that jurisdiction should be denied in cases like this where a declaration is sought establishing the invalidity of an anticipated defense (*Magic Foam Sales Corp. v. Mystic Foam Corp.*, 167 F. (2d) 88; *Wells v. Universal Pictures Co.*, 64 F. Supp. 852); and that it must be shown that if coercive relief instead of declaratory

relief were being sought, the federal courts would have original jurisdiction (*Gully v. Interstate Natural Gas Co.*, 82 F. (2d) 145, 149).

The decision of the Court of Appeals is believed to be in conflict with prior decisions of the same court in *Ohio Casualty Co. v. Marr*, 98 F. (2d) 973 (cert. den. 305 U. S. 652); *McCarty v. Hollis*, 120 F. (2d) 540; and *Sinclair Refining Co. v. Burroughs*, 133 F. (2d) 536, in which it was held that the Declaratory Judgment Act has not created any new right or cause of action and has not changed or extended federal jurisdiction or changed or altered the character of controversies falling within federal jurisdiction.

If the opinion of the Court of Appeals be accepted as correct, then these decisions must be disapproved and it must be held that federal jurisdiction has been vastly extended by the Declaratory Judgment Act into a new field where jurisdiction exists if the construction of a federal statute is invoked by the plaintiff for no purpose except to avoid a defense that may or may not be asserted by the defendant. If original federal jurisdiction exists here, then it would exist in any case where, because of the presence of a federal question raised by the defendant, this Court would have appellate jurisdiction. Under such a rule, original federal jurisdiction in the district court would be made as broad as the appellate jurisdiction of this Court to review judgments of state courts denying the validity of federal defenses.

We next submit that the case is not one "arising" under the Federal Natural Gas Act, but, instead,

is one arising under the termination clause of the three contracts between Phillips and the three petitioners and under the state law ascribing validity and legal effect to such termination clause.

Where a contract is made under a state law, the fact that its construction may require resort to some federal statute to ascertain its meaning and effect does not mean that a controversy concerning its construction is one arising under the federal statute. *Miller's Executors v. Swann*, 150 U. S. 132; *L. & N. R. R. Co. v. Western Union Telegraph Co.*, 237 U. S. 300; *Interstate Street Ry. Co. v. Massachusetts*, 207 U. S. 79; *Gully v. First National Bank*, 299 U. S. 109, 114-116; and *Puerto Rico v. Russell & Co.*, 288 U. S. 476.

In this connection we direct attention to the recent opinion of the Court in *National Mutual Insurance Company v. Tidewater Transfer Company*, 337 U. S. 582, and more especially to the opinion of Mr. Justice Jackson, in which Mr. Justice Black and Mr. Justice Burton joined, as well as to the concurring opinion of Mr. Justice Rutledge, to which Mr. Justice Murphy agreed. The clear inference from these opinions is that this Court still adheres to the test of jurisdiction as stated by Mr. Justice Cardozo in *Gully v. First National Bank*, 299 U. S. 109, 121, as follows:

"To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

In the opinion of Mr. Justice Jackson the following statement is quoted from *Puerto Rico v. Russell & Company*, 288 U. S. 476, 483, with emphasis added:

"The federal nature of the right to be established is decisive—not the source of the authority to establish it."

The Court of Appeals in the instant case referred to the *Gully case* (174 F. (2d) 97, 98) and the following statement was made—the same statement that was in effect made by the same learned judge in *Regents of New Mexico College v. Albuquerque Broadcasting Co.*, 158 F. (2d) 900, 907:

"To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element and an essential one of the plaintiff's cause of action."

There is no conflict between the opinion of the court below and the opinion of this Court in the *Gully* case in the statement of the applicable rule as to jurisdiction. The holding in this case is erroneous because it proceeds upon the erroneous theory that the cause of action is asserted under the Natural Gas Act and the rules and regulations of the Commission, whereas, respondent's cause of action is grounded upon the contracts and not at all upon the Natural Gas Act or the rules and regulations of the Commission.

Point Two

The order of November 30, 1946, was not in effect on that date, or on December 2, 1946, when the termination notices were sent, as a certificate then authorizing "the construction and operation" (the language of the contracts) of the proposed pipe line. It did not then presently grant Michigan-Wisconsin right and authority to begin the construction and operation of the pipe line and therefore was not such a certificate as satisfied the termination clause of the three contracts.

The termination clause of the three contracts with respondent is quoted, *ante*, p. 5. The facts concerning the order dated November 30, 1946, and its principal provisions are set out, *ante*, pp. 10-14.

The primary question on the merits arising under the pleadings and evidence is whether said order of November 30, 1946, was on that date such an order (immediately effective as the issuance of a certificate) as satisfied the termination clause of the three contracts and destroyed the right of petitioners to terminate them. We say "on that date" because the notices to terminate were sent on December 2, 1946, and there is no claim that prior thereto any order was made other than said order of November 30, 1946. If that order did not become effective on that date, as the order described in the contracts, then the right to terminate admittedly existed when the telegrams of termination were sent.

In Section 2 of Article II of the contracts between respondent and petitioners, petitioners were given

the benefit of any termination by Phillips pursuant to the terms of its contract with Michigan-Wisconsin. In addition, petitioners reserved the right to terminate their contracts by written notice delivered at any time after December 1, 1946, and before the issuance to Michigan-Wisconsin of "a certificate of public convenience and necessity for the construction and operation of its pipe line." (*Ante*, p. 5.) Under the conditions set forth in said order of November 30, 1946, it was not on that date an order then authorizing Michigan-Wisconsin to begin the construction of, and later to operate, a pipe line. That right was to accrue only after the Commission had taken (in the so-called supplemental order or orders) additional administrative action of a discretionary nature. This action involved the exercise by it of the same administrative discretion that it exercised in making said order of November 30, 1946. The order of November 30, 1946, on its face showed that it represented only partial or incomplete administrative action and that additional administrative action on the part of the Commission itself and on the part of other administrative bodies referred to was required to make it final and to mature in Michigan-Wisconsin the right to construct and operate the pipe line. Unless these additional administrative actions were taken by the Federal Power Commission and other administrative bodies, Michigan-Wisconsin would never, under the order of November 30, 1946, have the right to construct and operate the pipe line.

Respondent and petitioners had contracted, as is evident from the language of their contracts, in

contemplation of a certificate presently authorizing the construction and operation of a pipe line, and this appears from the words used in the contracts—"a certificate of public convenience and necessity for the construction and operation of its pipe line."

Let it be supposed that the order of November 30, 1946, had expressly provided that it should not become effective until one, or five, or ten years after date. Clearly it would not be such a certificate as was contemplated by petitioners and respondent when they entered into the contracts. The conditions imposed made the order just as ineffective presently to authorize the construction and operation of the pipe line as it would have been if the order had provided that it should be effective two years from date.

At the time of the pre-trial conference the Wisconsin authorizations had not been secured. (R. 217-218.) If never secured, would the order of November 30, 1946, nevertheless then constitute a certificate of public convenience and necessity within the meaning of the contracts, bearing in mind that the contracts provided for a certificate of convenience and necessity authorizing the construction and operation of a pipe line, while the order of November 30 provided that the facilities should not be used for the transportation and sale of gas until such authorizations were obtained?

The Commission found in sub-paragraph (4) of the findings in the order of November 30, 1946, that the project could be "neither financed, constructed, nor operated" without Michigan-Wisconsin's securing the necessary authorizations from the State of Wisconsin and the communities to be served therein

and the necessary approval by the Securities and Exchange Commission of its plan of financing. (R. 440-441.)

Manifestly the parties did not contemplate that the gas covered by the contracts should be indefinitely tied up while petitioners awaited the efforts of Michigan-Wisconsin to obtain, after December 1, 1946, such further action by the Federal Power Commission and state administrative agencies as was necessary to make the order of November 30, 1946, effective as authorization for the construction and operation of a pipe line.

It is no answer to say that the Commission is given power to impose conditions in issuing certificates. The contracts clearly contemplated and required a completely effective certificate that would *entitle* Michigan-Wisconsin to "construct and operate" the proposed pipe line and unless such a certificate was issued on or before December 1, the petitioners would have the right to terminate their contracts, provided they gave notice of termination prior to the issuance of "such certificate." It would be unreasonable to impute to the parties to the contracts an intention to make a contract for the sale of gas under which the purchaser could delay performance for an indefinite period of time—even for years—and at the same time hold the gas under the contracts and prevent its being marketed to others.

Petitioners do not depend upon the non-performance of the so-called conditions set forth in the order, but rather they depend upon the nature of the order as so conditioned. These conditions were of such a character that Michigan-Wisconsin might never be

able to operate a pipe line, with the result that respondent would never be able to take gas under the contracts; or the delivery of gas might be delayed so long in awaiting the performance of the conditions that the value of petitioners' reserves would be destroyed by drainage to the lands of others.

To defeat the right to terminate, it was necessary under the plain language of the contracts that Michigan-Wisconsin obtain, on or before December 1, 1946, *authority* to construct and operate its proposed pipe line, or petitioners at any time after that date would have the right to terminate their respective contracts. Under the contracts, to defeat the right of termination, it was not enough that the Commission should issue a piece of paper called a certificate of public convenience and necessity; it was necessary that the Commission presently grant to Michigan-Wisconsin the *right and authority* to begin the construction and operation of the pipe line. The contracts dealt with actualities and not with bare formalities devoid of legal effect. Michigan-Wisconsin was to get not merely a so-called certificate but was to acquire on or before December 1, 1946, the present *right and privilege* to construct and operate the proposed line.

The order of November 30, 1946, in effect provided that the *right* to construct and operate the pipe line might be enjoyed at some later time, if and when the Commission, in the exercise of its discretion might take later action; that is, might issue another order, called "supplemental order" in the order of November 30. Such a so-called certificate clearly did not satisfy the contracts.

Arguendo we assume the power of the Commission to provide that the certificate should consist *in part* of one order and *in part* of a "supplemental order," especially where the Commission in the first order expressly states, as this order did in its Paragraph (C), that its effectiveness is to be delayed pending the "issuance" of the second order. It was open to the Commission to divide the certificate into two parts, one part made on November 30, 1946, and prohibit the exercise of rights or privileges thereunder until the remaining part, denominated in the order of November 30 as the "supplemental order," was issued. The contracts called for an order that was to be in full force and effect at any and all times after December 1, 1946. To be *in effect* it was necessary that the order should presently grant the authority to construct and operate the line. To delay the grant of that *authority* was to delay the *effectiveness* of the so-called certificate.

We assume the power of the Commission to delay the effective date of such a certificate for one year, two years, or ten years. But a certificate, the *effectiveness* of which as a grant of authority was delayed by the Commission beyond December 1, 1946, would not satisfy the contracts. Here the effective date of this certificate order was to be delayed until the Commission had conducted another hearing and had issued what is designated in the record as the supplemental order. The supplemental order was not issued until March 12, 1947. It is, therefore, plain that Michigan-Wisconsin did not acquire from the Federal Power Commission a certificate of public convenience and necessity on or prior to December

2, 1946. This being true, the right to terminate then vested in petitioners.

It is immaterial that the certificate order declares that a certificate of public convenience and necessity is "hereby issued." That declaration is without effect when considered alongside the fact that the applicant did not acquire on or before December 2 the *right* to construct and operate the line.

What may be called the "present tense" or "label" argument cannot prevail. A declaration that the certificate is "hereby issued" can have no effect in the face of the fact that the order did not presently and immediately grant the right and authority to construct and operate the line. Giving something a name cannot fix or change its character as created by actual fact. Mere terminology is never controlling. *Columbia Broadcasting System v. United States*, 316 U. S. 407, 416; *G. H & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 227 (per Mr. Justice Holmes); *Dawson v. Kentucky Distilleries Company*, 255 U. S. 288, 292 (per Mr. Justice Brandeis). "We look behind the name to the thing named, its character, its relations, and its functions, to determine its position, and not the mere title under which it passes." *Beach v. Leahy*, 11 Kan. 23 (per Mr. Justice Brewer). Stating that a certificate is "hereby issued" does not change the fact that the order did not presently and immediately grant right and authority to construct and operate the proposed line.

Point Three

There is a clear conflict between the decision of the Court of Appeals in this case and the adjudica-

tion by the Court of Appeals for the District of Columbia respecting the quality and effectiveness of the order of November 30, 1946, and the adjudication of the latter court is conclusive in this case.

We have set out the basic facts concerning the suit filed by Panhandle Eastern Pipe Line Company in the Court of Appeals for the District of Columbia. (*Ante*, pp. 15-17.) The decision in that case and the decision of the Court of Appeals in this case are clearly conflicting. In the instant case the court below held that the order of November 30 was effective to issue on that date the certificate therein referred to. (Tr. 722, *et seq.*) This, by necessary implication, was a holding that said order became immediately a final order and subject to review. Such holding is in direct conflict with the April 21, 1947, holding of the Court of Appeals for the District of Columbia in the *Panhandle Eastern* suit for a direct judicial review of the November 30 order. It was there held that "the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders," and on that ground said Court dismissed Panhandle Eastern's petition for review "without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final; * * *." (R. 704.) Said court gave clear recognition to the fact that the order of November 30 showed on its face that it was not to become final or represent final action on the part of

the Commission until the order referred to in it as the "supplemental order" had been issued by the Commission.[2]

The decision of the Court of Appeals for the District of Columbia, dated April 21, 1947, was a final judgment and decision. *Wilson v. Republic I. & S. Co.*, 257 U. S. 92, 96. It was obviously predicated on the well settled rule that only final orders of administrative agencies are subject to judicial review. *Federal Power Commission v. Metropolitan-Edision Co.*, 304 U. S. 375, 383-385. Its necessary legal effect was that the November 30 order did not presently issue a certificate. If said order had on that date issued a certificate, it obviously would have been subject to judicial review.

That the judgment of April 21, 1947, had the legal effect of holding that the November 30 order did not issue a certificate on its date is believed to be settled by the decisions of this Court in *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310; and *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103, 110-113 (the minority opinion concurring on this point, 333 U. S. 116), and in other prior decisions of this Court cited in the majority opinion in the *Chicago & Southern* case (333 U. S. 113), namely, *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299; *United States v. Illinois*

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[2] The April 21, 1947, decision is not to be confused with the June 3, 1948, decision of said court, 169 F. (2d) 881, on Panhandle's second petition for review filed (see Commission's docket entry of July 3, 1947, R. 734) after the supplemental order and opinions were issued.

C. R. Co., 244 U. S. 82; and *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 131; and in a number of other prior decisions of this Court, notably, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, and *Federal Power Commission v. Metropolitan-Edison Co., supra.* Until the order of an administrative agency is complete and final, it does not grant or withhold any authority, privilege or license. (The *Chicago & Southern Air Lines* case, 333 U. S. 112-113, citing *United States v. Los Angeles, supra*, and other cases.) Only an order which is *final*, and therefore has reached the stage where a review of it could be *sought* and *pursued*, could be effective as the grant and issuance of a certificate—"for only then was the decision consummated, announced and available to the parties," and until then "it grants no privilege and denies no right. It can give nothing and take nothing away from the applicant or a competitor." (Majority opinion in *Chicago & Southern Air Lines case*, 333 U. S. 110-111.) And only then "has the basis been laid for issuance of certificates." (Minority opinion same case, 333 U. S. 116.)

The adjudication by the Court of Appeals for the District of Columbia that the order of November 30, 1946, was not final "because it required for completion the issuance of a supplemental order or orders" is tantamount to an adjudication that said order of November 30, 1946, did not have on its date the legal effect of granting any right or privilege to Michigan-Wisconsin to construct and operate its proposed pipe line; that is, it did not grant or issue

a certificate of public convenience and necessity and would not do so unless and until it should be completed by the issuance of a supplemental order or orders making it final.

As the basis for the holding of the Court of Appeals in the instant case that the November 30 order issued a certificate on its date, it held that the present tense language in Paragraph (A) of said order, considered with subsequent statements of the Commission that it issued a certificate on November 30, showed a clear intention to issue the certificate on that day and by that order. (R. 722-723.) It further held that Paragraph (C) (*ante*, p. 13) in said order was intended by the Commission only to postpone the filing of an application for rehearing with respect to the limitations contained in Paragraph (B) (viii) of said order relating to service in the Detroit and Ann Arbor markets. (R. 726.) Both of these holdings are in conflict with the April 21, 1947, decision, because that decision, by necessary implication, interpreted Paragraph (C) as intending to provide (as its plain and unmistakable language does provide) that the November 30 order as a whole should be withheld from issuance and suspended for the purpose of filing applications for rehearing of said order as a whole until the issuance of the opinions and the supplemental order. It also had the effect of holding that the present tense language in Paragraph (A) of said order was not intended to speak and have effect until the opinions and supplemental order should be issued and of holding that the subsequent statements of the Commission that it had

issued a certificate on November 30 were mere erroneous legal conclusions.[3]

This Court denied certiorari in the *Panhandle Eastern case.* (332 U. S. 762.) The Commission filed a brief in opposition to Panhandle Eastern's petition for certiorari. We assume the Court will take judicial notice of the proceedings had in this Court in that case. (Case No. 147, October Term,

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[3]Contrary to the holding of the court below in the instant case, the Commission interpreted Paragraph (C) as applying to and affecting the November 30 order as a whole. In its order of January 14, 1947 (R. 694-696), after quoting said paragraph, the Commission denied four applications for the reconsideration and vacation, or, in the alternative, a rehearing of the November 30 order upon the sole ground that they were prematurely filed because filed in advance of the issuance of the opinions and the supplemental order. Afterwards in footnote 1 (R. 537-538) to the supplemental opinion issued March 12, 1947, it recited and reaffirmed its January 14 action and assigned reasons for proceeding in accordance with said paragraph. Then in its motion (R. 676-680) filed in the review case on March 18, 1947, to extend the time for filing therein its transcript of the record, the Commission again so interpreted said paragraph. In said motion the following, among other things, was said (R. 679):

> "The latter date" March 12, 1947 "designated the commencement of the tolling of the statute with respect to filing applications for rehearing of the Commission's order of November 30, 1946, and related orders as prescribed in paragraph (C) of the aforementioned order including said supplemental order issued March 12, 1947."

1946.)[1] Hence, we deem it proper to refer to the Commission's brief wherein it asserted that the November 30 order was not final and that additional action "was necessary to complete the administrative action." We quote from the Commission's brief filed in this Court the following:

"The Court below, upon its own motion, dismissed Panhandle's petition for review because it found that the issuance by the Commission of an order supplemental to those included in such petition was necessary to complete the administrative action. This supplemental order was that which was provided for by the Commission in subparagraph (B) (viii) of its order of November 30, 1946, issuing the certificate to Michigan-Wisconsin. The purpose of such supplemental order was to determine the rights and duties of petitioner in the Detroit and Ann Arbor markets. Prior to issuance of such supplemental order the Commission had not determined to what extent the facilities for which a certificate had been issued to Michigan-Wisconsin could be used for the transportation and sale of gas for resale in the Detroit and Ann Arbor markets.

"* * * The administrative process was thus not complete, and the Commission's orders which were

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[1]An examination of Panhandle Eastern's petition for review of the November 30 order and the joint motion of National Coal Association and United Mine Workers of America for leave to intervene in the review case, and of their respective above referred to applications for rehearing which had been filed with the Commission, will show that in each thereof the November 30 order was being attacked as a whole. All of said pleadings are contained in the Transcript of the Record filed in this Court in said Case No. 147, October Term, 1946.

before the court were not reviewable. Federal Power Commission v. Metropolitan-Edison Company, 304 U. S. 375 and cases cited at 384-385." (Brief referred to, pp. 9-10.)

The position thus taken by the Commission in the *Panhandle Eastern* case emphasizes the clear conflict between the decision in that case and the decision in the instant case in respect to the status of the order of November 30, 1946. It was decided in the *Panhandle Eastern* case that said order was not a final order and constituted only incomplete administrative action. The instant case held to the contrary.

The April 21 decision was rendered in a proceeding for a direct review of the November 30 order by a court having statutory jurisdiction to review said order. That decision was binding upon the Commission.* The parties to petitioners' contracts in effect agreed to abide, and therefore were bound, by the result of the proceedings before the Commission. (R. 36-38; 41.) *Bank of Commerce v. City of Louisville* (Taft, Cir. J.), 88 F. 398, 405-407 (reversed on another point, 174 U. S. 412); *Rapelye v. Prince*, 4 Hill (N. Y.) 119, 40 Am. Dec. 267; *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619; *Brown v. Sprague*, 5 Denio (N. Y.) 545. In its decision the Court of Appeals in the instant case failed and re-

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Napa Valley Electric Co. v. Railroad Commission of California, 254 U. S. 366; *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, 160; *Interstate Commerce Com. v. Baird*, 194 U. S. 25, 28; *Federal Communications Com. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Louis Eckert Brewing Co. v. Unemployment Reserves Com.* (Calif.), 119 P. (2d) 227, 228.

fused to accept as conclusive the April 21, 1947, decision, although the November 30 order was only collaterally involved in the instant case, whereas it was directly involved in the District of Columbia case. The question as to whether the April 21, 1947, decision conclusively established the character and status of the November 30 order for all purposes of the instant case presents an important question of both judicial and administrative procedure which this Court should determine.

It is believed to be elementary law that a direct review is superior to a collateral review or attack, and where a court having power of direct review has already adjudicated the status or effect of the administrative action brought under its review, other courts before which such question is raised collaterally must of necessity respect that decision. If every other court, federal or state, is at liberty in a collateral proceeding to disregard what has been determined by the statutory court in a direct proceeding and itself pass independent judgment contrary thereto, then intolerable confusion and conflict of decision will result.

The April 21, 1947, decision correctly decided the question as to the effect of Paragraph (C), which was the provision in the order which "required" the issuance of the additional order or orders to make the November 30 order a final order. Furthermore, by the words, "the date of issuance of this order shall be deemed to be the date of issuance of" the opinions and supplemental order, whichever may be the later, said paragraph in terms postponed the "issuance" of said order and thereby expressly withheld and

suspended its effectiveness until that time, not only the certificate purportedly issued in present tense language by Paragraph (A) thereof, but also findings (6) and (7) (R. 441) relating to the ability of the applicant and the requirement of public convenience and necessity.[9] By said paragraph the Commission had no intention, as the court below indicated it may have had (R. 726), to extend the thirty-day statutory period within which applications for rehearing of the order might be filed, but rather to withhold the effectiveness of said order and its availability to the parties as the Commission's official act until the completion of the administrative process and the issuance of its actions doing so, at which time said period was to begin to run. As said in the Commission's brief, from which we quote above, prior to issuance of such supplemental order the Commission had not determined to what extent Michigan-Wisconsin's facilities could be used for the transportation and sale of gas for resale in the Detroit and Ann Arbor markets, and therefore the administrative process was not complete. It was the

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[9]The "opinions" would deal with the facts in detail as developed by the evidence; they were to contain clear and complete findings of the basic and essential facts on which the order and related orders would rest, and thus comply with this Court's holding in *Colorado-Wyoming Gas Co. v. Federal Power Com.*, 324 U. S. 626, 634, and also to give support to the ultimate conclusions contained in findings (6) and (7) as required by this Court's decisions in such cases as *Interstate Commerce Com. v. Parker*, 326 U. S. 60, 64; see, also, *Saginaw Broadcasting Co. v. Federal Communications Com.* (Ct. App. Dist. of Col.), 96 F. (2d) 554, 559-560.

Commission's decision, as shown by Paragraph (C), and as in effect held in the April 21, 1947, decision, that said determination was essential to the finalization of the entire order; and the order was expressly held in abeyance for that purpose, as well as for the purpose of properly supporting the order by the opinions.

Point Four

The Court of Appeals erred in holding that the district court did not abuse its discretion in refusing to dismiss or abate, or, in the alternative, to stay this action.

We adopt here the statement heretofore made, *ante*, pp. 14-15. The following authorities are believed to be applicable:

Brillhart v. Excess Ins. Co., 316 U. S. 491;
Indemnity Ins. Co. v. Schriefer, 142 F. (2d) 851;
Ætna Casualty Co. v. Quarles (4th Cir.), 92 F. (2d) 321;
Maryland Casualty Co. v. Consumers Finance Service (3rd Cir.), 101 F. (2d) 514;
American Automobile Ins. Co. v. Freundt (7th Cir.), 103 F. (2d) 613.

This Court in *Brillhart v. Excess Ins. Co., supra*, used the following language:

"The motion rested upon the claim that, since another proceeding was pending in a state court in which all the matters in controversy between the parties could be fully adjudicated, a declaratory

judgment in the federal court was unwarranted. The correctness of this claim was certainly relevant in determining whether the District Court should assume jurisdiction and proceed to determine the rights of the parties. Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." (316 U. S. 494-495.)

It is plain that the respondent is seeking to use the declaratory judgment remedy for an improper purpose; that is, to make a new choice of tribunals. It made its first choice when it attempted to remove the Texas actions to the United States District Court for the Western District of Texas. After invoking the jurisdiction of that Court—a court of the United States—it was clearly not entitled to go into another United States court and seek the identical relief that it could obtain defensively, if not affirmatively, in the Texas actions.

In *American Automobile Ins. Co. v. Freundt*, 103 F. (2d) 613, the Circuit Court of Appeals for the Seventh Circuit said:

"The Supreme Court has held that the Declaratory Judgment Act is not jurisdictional but procedural only; and that it merely grants authority to courts to use a new remedy in causes over which they have jurisdiction. The roots of declaratory procedure are found in equity procedure, chiefly in the quia timet relief. The wholesome purpose of declar-

atory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum. It was not intended by the act to enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the removal act, and such would be the result in the instant case." (103 F. (2d) 617.)

What the respondent attempted to do in this case, in effect, was to remove the two actions filed in the Texas state court, and first removed by it to a federal court in Texas, from that court to a federal court in Oklahoma. It had already made one choice of tribunals and by this action is seeks to make a new choice, reversing the choice already made by it in Texas.

This case is unlike any other reported case. The action was filed July 15, 1947. (R. 11.) The State court actions previously filed by Skelly and Stanolind were filed (Skelly's) May 21, 1947 (R. 78), and (Stanolind's) May 20, 1947 (R. 89.) Both were removed to the federal court in Texas on June 16, 1947 (R. 81, 92), and therefore both were pending on removal by Phillips in the United States District Court for the Western District of Texas when this action was filed in Oklahoma. These facts raise the question of whether Phillips, after invoking the jurisdiction of the federal court in Texas, had the right to file this action involving the same matter in a federal court in Oklahoma.

Petitioners pray that the judgment of the Court of Appeals for the Tenth Circuit be reversed and

the cause be remanded to that Court with instructions to reverse the judgment of the district court, and direct that court to dismiss the action, or, in the alternative, with instructions that the district court enter judgment on the merits in favor of petitioners, denying the relief prayed for in said action by the respondent and granting the petitioners the relief prayed for in their respective answers; and for costs.

Respectfully submitted,

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